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No. 74-538

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The court filed an opinion (App. D, *infra*) on December 12, 1973. The government filed a timely petition for rehearing with a suggestion for rehearing *en banc*, whereupon the court withdrew its original opinion. A new opinion (App. A, *infra*) was issued on March 20, 1974, and the judgment of the court of appeals was entered the same day (App. B, *infra*). The

government again filed a timely petition for rehearing with a suggestion for rehearing *en banc*. It was denied on September 5, 1974 (App. C, *infra*). By order of October 2, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest in a public place.

2. Whether a person unlawfully in custody is capable of giving a voluntary consent to a search of his automobile.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On August 17, 1972, Awad Khoury, an informant who had provided reliable information on at least five prior occasions (Tr. 10–14, 27–28),[1] telephoned Postal Inspector Frank L. Barbarick. Khoury related that he was going to receive from respondent a stolen Bank of America credit card in the name of Syed T. Ahmad. Later that day Khoury brought Barbarick the credit card he had described. The inspector ascertained from the Bank of America that the credit card had been mailed on August 14, 1972, but had not been received by the intended customer. Khoury told Barbarick that respondent gave him the card with instructions to purchase airline tickets in specified names and addresses, and he showed Barbarick a list of the names and addresses. When Khoury said that he could obtain more credit cards from respondent, Barbarick instructed him to meet with respondent to obtain them (Tr. 14–17). A meeting was arranged, but it was postponed several times.

[1] "Tr." refers to the transcript of the trial proceedings.

Barbarick instructed Khoury to find out at the meeting whether respondent had additional credit cards. If he did, Khoury was to light a cigarette as a signal to surveilling agents. The meeting finally took place at noon on August 23, 1972, in a public restaurant (Tr. 19, 21). After learning that respondent had stolen credit cards in his car, Khoury gave the prearranged signal (Tr. 246). Postal inspectors entered the restaurant, arrested respondent, and searched him. They did not, however, find any stolen credit cards.[2] They escorted him out of the crowded restaurant and gave him *Miranda* warnings. Respondent stated: "Frank [Barbarick], I understand my rights"[3] (Tr. 22–23, 162).

[2] Khoury did not tell the inspectors at the scene that the cards were in respondent's car.

[3] Respondent and Barbarick knew each other. Respondent had been arrested by Barbarick in 1971 for mail theft and subse-

Barbarick asked respondent whether he could look in respondent's car. Respondent replied, "Go ahead." Before beginning the search Barbarick warned: "You know, if I find anything, it is going to go against you." Nevertheless respondent reaffirmed his consent, stating: "Go ahead, there is nothing in there" (Tr. 23–24). Using keys furnished by respondent, the postal inspectors searched the car. Under the floormat they found two stolen credit cards, which, together with the card provided by Khoury, formed the basis of the criminal charges against respondent (Tr. 24–25).

Respondent moved to suppress the stolen credit cards. The district court denied his motion from the bench (Tr. 60–61), and respondent was subsequently convicted of possessing the two stolen credit cards found in his automobile. He was acquitted on a third count charging him with possessing the stolen card provided by informant Khoury.

A divided panel of the court of appeals reversed. The court ruled that the information gathered on August 17, including the physical receipt of a stolen credit card, provided probable cause to arrest respondent. The majority believed that Inspector Barbarick should have obtained a warrant on August 17 for respondent's arrest, and because it could find "no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant" (App. A, *infra,* p. 5A), it concluded that the warrantless arrest on August 23 was unconstitutional. Proceeding on the conclusion that respondent was under unconstitutional arrest, the majority found that the consent to search the car was defective. Rather than hold that the consent was a "fruit" of an unconstitutional act, the court found that the consent was involuntary because respondent "was in custody in violation of the Fourth Amendment" (App. A, *infra,* p. 7A). Therefore, although respondent had been given *Miranda* warnings, had been told that any evidence found in the car would be used against him, and was on a first-name basis with the arresting inspector, and no circumstances suggesting coercion were present, the court ordered the credit cards found in the consent search suppressed.

The dissenting judge concluded that officers are not required to procure an arrest warrant as soon as they acquire probable cause, but may instead continue their investigation. Here, he found, their suspicions were reinforced by Khoury's signal at the restaurant, and the ensuing arrest was lawful (App. A, *infra,* pp. 7A–8A).

quently had acted as his informant (Tr. 69, 169–170). The charge was dismissed after respondent furnished postal authorities with important information (Tr. 49–50).

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions concerning the procedure law enforcement agents should follow when making a felony arrest on probable cause. The first question deals with the necessity of obtaining a warrant even though the arrest is made in a public place where the officers would have every right to be without a warrant. The second is

whether one under unlawful arrest may nevertheless give an effective consent to search.

If the Court holds, as we believe precedent and logic compel, that there is no need to secure a warrant to make such an arrest, then the predicate for the court of appeals' decision to suppress the evidence disappears, and it would be unnecessary to reach the second question. Conversely, the Court might assume that the arrest was unconstitutional and decide, as we believe would be required in the circumstances here presented, that the consent was nevertheless effective. Both issues are sufficiently important to the administration of the criminal justice system that they should be decided by this Court.

1. It has been until now the unquestioned rule that an arrest for a felony may be made with probable cause but without a warrant. The court of appeals, relying upon what it believed were implications in the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 476–481, has abruptly set aside that understanding. If the decision of the court of appeals is permitted to stand, it will be necessary for law enforcement agents substantially to change the procedures they use in investigating crime and arresting suspects. This Court should reverse the court of appeals and reaffirm the rule that has been under a cloud since *Coolidge*.

a. The rule that a warrant is unnecessary to make an arrest for a felony on probable cause is an ancient one with its roots in the common law of England, where arrests *with* warrants were viewed with intense

suspicion.[4] As this Court stated the principle in *Carroll* v. *United States*, 267 U.S. 132, 156–157:

> [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll*, this Court has many times reaffirmed the rule, often in the context of state or federal statutes granting to officers the power to arrest without a warrant. See, *e.g.*, *Henry* v. *United States*, 361 U.S. 98, 100.[5] The decision below disregards these precedents. If the court of appeals is correct, not only standard law enforcement procedure but also numerous federal statutes permitting arrest without a warrant would be called into question.[6]

The court of appeals believed its result to be supported by the plurality opinion in *Coolidge* v. *New Hampshire*, *supra*. The arrest in *Coolidge* took place in a private home that ordinarily could not be entered

[4] Coke, *Fourth Institute of the Laws of England* 177 (1797 ed.). See generally Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46.

[5] 18 U.S.C. 3052 provides for warrantless arrests when an offense is committed in an officer's presence or when an officer has "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony. The Court found in *Henry* that this section "states the constitutional standard." 361 U.S. at 100.

[6] The following federal statutes, all upheld by decisions of one or more courts of appeals, permit federal agents to arrest without a warrant under certain circumstances: 18 U.S.C. 3052 (F.B.I.); 18 U.S.C. 3056 (Secret Service); 21 U.S.C. 878 (Bureau of Narcotics and Dangerous Drugs; by substitution, Drug Enforcement Agency); 26 U.S.C. 7607 (Customs Service).

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without a warrant. The arrest was then used as justification for a search of the entire premises. In the instant case, however, the arrest took place in a restaurant where the officers, even without a warrant or probable cause to arrest, were entitled to be. There was no exhaustive search using the pretext of an arrest;[7] respondent's person was searched, and his consent was obtained before searching his car. The *Coolidge* plurality carefully restricted its discussion to the propriety of warrantless entry into a house for the purpose of making an arrest. 403 U.S. at 476, 477, 480.

Although *Coolidge* therefore does not support the result reached below, its discussion of the law of arrest has injected an element of uncertainty into what was before a settled point of law. Litigation in the lower federal courts over the propriety of an arrest without a warrant has been increasing since *Coolidge* was decided. The decision below, which is the first of which we are aware that requires a warrant for an arrest in a public place,[8] conflicts with several recent court of appeals decisions holding that *Coolidge* did not create such a requirement. See *United States* v. *Miles*, 468 F. 2d 482, 486 (C.A. 3); *United States* v. *Bazinet*, 462 F. 2d 982 (C.A. 8); *Dorman* v. *United States*, 435

[7] The arrest of respondent could not have been a pretext to avoid the need for a search warrant. Until informant Khoury gave the signal in the restaurant the inspectors had no probable cause to believe respondent was in the immediate possession of stolen credit cards, and they therefore could not have obtained a warrant to search his person or his automobile.

[8] *Niro* v. *United States*, 388 F. 2d 535 (C.A. 1), arguably supports the result reached below.

F. 2d 385, 389–391 (C.A.D.C.) (*en banc*); *United States* v. *Morris*, 477 F. 2d 657 (C.A. 5). This conflict among the circuits should be resolved by this Court.

b. The decision below will seriously hamper effective law enforcement without providing significant protection to the individual's interests. It exposes officials to the dilemma rejected—in the Sixth Amendment context—in *Hoffa* v. *United States*, 385 U.S. 293, 310. Police will be required to ascertain at their peril the exact moment that the courts will later hold that they acquired probable cause to arrest, and thereupon to secure a warrant without delay. If they fail to recognize that they had probable cause, they risk suppression of their later discoveries. If, on the other hand, officers obtain the warrant required by the decision below but delay execution in order to gather the evidence necessary to convict, they may be criticized for deliberately postponing execution for the purpose of "prejudicing" the defendant, a practice some courts have forbidden. See, *e.g.*, *Godfrey* v. *United States*, 358 F. 2d 850 (C.A.D.C.). They risk a violation of the Fourth Amendment if they act too soon, and a violation of the Fourth Amendment if they wait too long.

Moreover, as *Hoffa* recognized, to require a warrant as soon as probable cause has been detected may force the officers to cut off an investigation before they have secured sufficient evidence to convict—a situation forcefully illustrated here by the acquittal of respondent on the count charging him with possession of the credit card that the informant, Khoury, gave to inspector Barbarick and that furnished the

initial probable cause. And to the extent the officers delay execution while gathering additional evidence, they continue to intrude on the suspect's privacy, so that the warrant will have provided him no shield.

The ironic result of the reasoning of the majority below is that police may be best off should the magistrate decline to issue a warrant when first approached. The officers then would be free to continue their investigation. As in the instant case, they could arrange for the gathering of additional evidence and arrest (without a warrant) on the basis of the new evidence plus exigent circumstances. For example, it could have been argued that the arrest of respondent was based on such exigent circumstances; had he left the restaurant without being arrested, he might have secreted the stolen credit cards or disposed of them.[9]

In short, the decision below on the arrest issue is contrary to existing precedent and revolutionary in its implications. It will not provide additional protection to individual interests, but it will hamper the enforcement of the laws and discourage the very kind of police work—such as that engaged in here by postal authorities—that sound Fourth Amendment policy should encourage.

2. If it is assumed or concluded that respondent was improperly arrested, it is then necessary to determine

[9] Of course, exigent circumstances at the moment of arrest would not be a satisfactory answer to the court of appeals' theory (if that theory is correct) that the inspectors should have sought a warrant six days previously, and that it would have been obtained if sought. Cf. *Vale* v. *Louisiana*, 399 U.S. 30.

whether that precluded an effective consent to the search of his car. Although the court of appeals purported to consider the "totality" of the circumstances, we submit that it did not do so and instead elevated the legal status of the arrest into a single and determinative factor.

The essential facts were undisputed. Immediately after his arrest, respondent was given *Miranda* warnings;[10] he knew that he was under no obligation to converse further with the arresting officers. Respondent was not a neophyte at these procedures; he had been arrested before and had served as an informant for Inspector Barbarick, with whom he was on a first name basis (Tr. 23, 69). Respondent was familiar with his constitutional rights, including the right not to speak, and at one point after his arrest even suggested to Inspector Barbarick that he not bother to explain these rights again (Tr. 23). Finally, respondent was informed, after he gave his initial consent to the search, that if anything were found it would be used against him; he then reaffirmed his consent with the remark that there was nothing in the car (Tr. 23–24). We submit that this record contains overwhelming evidence that respondent fully understood his rights and voluntarily agreed to the search of his car. The only pertinent reason suggested by the court

[10] Another panel of the Ninth Circuit has joined several other courts in holding that evidence that a person was given *Miranda* warnings is also strong evidence that his consent was voluntary. *United States* v. *Heimforth*, 493 F. 2d 970.

of appeals for drawing a contrary conclusion is that respondent was under unconstitutional arrest.[11]

By directing its investigation to the conduct of the arresting officers, the court was injecting irrelevant factors into the voluntariness analysis of *Schneckloth* v. *Bustamonte*, 412 U.S. 219, 227, which focuses on the knowledge and intent of the person giving that consent and the totality of circumstances affecting his decision. Instead of undertaking this essentially subjective inquiry, however, the majority here considered as determinative the legality of the earlier conduct of the officers.

The illegality of the arrest depended upon what the officers had failed to do six days previously; none of the conduct constituting the failure to obtain a warrant took place in respondent's presence, and he cannot have known about it. He did not know that Khoury had informed on him six days previously. He did not know that no warrant had been obtained. Neither he nor the officers knew that the court of appeals would suddenly reverse many years of precedent and require a warrant for his arrest. Because

[11] The court of appeals also noted that respondent had not explicitly been advised of his right to refuse his consent. However, this advice is fairly implicit in the *Miranda* warnings and in Inspector Barbarick's warning after respondent's initial consent. In any event, *Schneckloth* v. *Bustamonte*, 412 U.S. 219, has held that lack of such knowledge is not determinative; the court of appeals here found not lack of knowledge but lack of express advice and therefore failed to make a finding that would be pertinent under *Schneckloth*. To the extent the court was relying on failure to warn (rather than failure to know), it was considering an extraneous factor for the reasons stated *infra*.

none of these things entered respondent's consciousness, they cannot have affected his decision to consent to a search of his car.

We believe that the correct approach—that the only proper focus of inquiry in a consent search case is on what the consenter knows—is implicit in *Schneckloth*. The court below has simply considered irrelevant material;[12] the way in which it did so, however, is seductive.[13] Consideration of such extraneous material by the court below and by other circuits will seriously deform the *Schneckloth* test and discourage law enforcement agents from relying on consents, even though procurement of voluntary consent is a technique less intrusive than others, including warrants, to which officials would be forced to turn were consents made less attractive and less reliable once obtained.[14]

[12] Irrelevant as part of any voluntariness formula. The illegality of the arrest might be pertinent under a "fruit of the poisonous tree" argument of the sort raised in *Brown* v. *Illinois*, No. 73–6650, certiorari granted October 21, 1974, but the court below did not use this analysis, nor do we believe that it would change the outcome.

[13] And contagious. See *Manning* v. *Jarnigan*, 501 F. 2d 408 (C.A. 6). See our petition for a writ of certiorari in *United States* v. *Cooks*, No. 74–333, presenting a related consent search issue.

[14] This case is in several respects a counterpart of *Brown* v. *Illinois*, No. 73–6650, certiorari granted October 21, 1974. *Brown* presents a situation in which an arrest is presumed illegal, and what follows the arrest is a confession rather than a consent. If this Court decides in *Brown* that the statement is admissible, then the consent in the instant case should be effective. On the other hand, if the statement in *Brown* must be suppressed, it will become even more urgent to consider our contentions here that a

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1974.

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warrantless arrest is proper, and that effective consent to search, which involves considerations materially different from those regarding confessions, may be given even by those under unconstitutional arrest.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT-APPELLANT

[March 20, 1974]

Appeal from the United States District Court for the Central District of California

Before ELY and GOODWIN, Circuit Judges, and MURRAY,* District Judge

MURRAY, *District Judge*: An indictment was filed against the appellant on September 11, 1972, alleging a four count violation of 18 U.S.C. § 1708 (stealing from the mails). Count 1 alleged a violation on August 23, 1972; Count 2 alleged a violation on August 17, 1972; Count 3 alleged a violation on August 23, 1972; and Count 4 alleged a violation on May 28, 1971. The appellant was ultimately tried on Counts 1, 2 and 3. Count 4 was dismissed. The jury returned a verdict of guilty as to Counts 1 and 3, and not guilty as to Count 2.

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*The Honorable W. D. Murray, United States District Judge for the District of Montana, sitting by designation.

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On the day of the trial, the district court heard motions to suppress evidence pursuant to Rule 41(e) Federal Rules of Criminal Procedure and a motion to determine the voluntariness of any post-arrest statements pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964). In response to these motions, the government called Frank L. Barbarick, a U.S. Postal Inspector, as a witness. Inspector Barbarick testified that he was contacted on the telephone by one Awad Khoury on August 17, 1972. He knew Khoury as Tony and had previous contacts with him from five to ten times. In the course of these prior contacts, Khoury related information concerning appellant Watson and his associates. This information was found to be reliable by Inspector Barbarick.

In the August 17, 1972, phone call, Khoury advised the Inspector that he, Khoury, was going to receive a Bank of America credit card from appellant Watson. The card was in the name of Syed T. Ahmad. Barbarick told Khoury to bring the credit card to Barbarick's office when he received it from Watson. Later on that day, Khoury brought the credit card into Barbarick's office. Khoury said that he had received this card from appellant and that appellant wanted him to purchase TWA airline tickets. Khoury also showed Inspector Barbarick a slip of paper that gave names and addresses for the airline tickets to be purchased. Inspector Barbarick told Khoury to arrange a meeting with appellant Watson. Khoury advised Barbarick that a meeting was scheduled for August 22, 1972, but this meeting did not take place. A meeting with Watson on August 23 similarly did not take place. Finally, a meeting between Khoury and Watson was set up for noon on the 23rd of August at Ship's Restaurant in Los Angeles. Barbarick testified that he told Khoury to determine at the

meeting whether Watson had any additional credit cards in his possession. If Watson did have some additional cards, Khoury was to light a cigarette as a signal to Postal Inspectors inside the restaurant. These inspectors would then activate a signal alerting Inspector Barbarick outside the restaurant. Upon receiving the prearranged signal Barbarick and other inspectors entered the restaurant and placed the defendant under arrest, advising him that he was under arrest for possession of stolen mail. Inspector Barbarick then asked Watson if he could look in his car. Watson said "Go ahead." Using the key to the car which Watson had turned over, Barbarick opened the car and searched. Under the floormat on the driver's side he recovered an envelope. Inspector Barbarick's later testimony indicated that the envelope which he discovered was not opened until he returned to his office in downtown Los Angeles. At that time he found that two smaller envelopes were contained inside the larger envelope and that it was these two envelopes which contained the credit cards which are the source of the allegations in Counts 1 and 2 [sic]. In making the arrest the inspector testified he was relying on the evidence acquired on August 17, 1972, which was six days prior to arrest.

In his initial argument, appellant raises the strictly technical point that a stipulation [1] which his attorney

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[1] The stipulation read as follows: "That on or about August 14th of 1972, BankAmericard Corporation sent through the mails three credit cards in separate envelopes, with separate addresses on them. That these three separate and distinct credit cards and envelopes were addressed to, number one, a Marlene M. Steinberg, at 12407 Ohio Avenue in Los Angeles. And that her credit card number was 4024 681 187 691. In addition, another credit card on or about August 14, was sent by BankAmericard to one Syed T. Ahmad. And that was sent to 1502

and the United States Attorney intended to introduce was never affirmatively or competently entered into or accepted by the court and that, consequently there is an absence of proof.

The record reveals that both parties, the court and the jury all were under the impression that the stipulation had been entered in the record. The agreement to stipulate was communicated to the court prior to the empanelling of the jury. The stipulation was read to the jury in the government's opening statement. The defense counsel referred to the stipulation during his cross-examination. The appellant himself made reference to the stipulation. Since all parties concerned were under the impression that the stipulation had been entered in the record, the defendant-appellant cannot be allowed to benefit from a purely technical error, if in fact there was error.

Appellant next contends that (A) the hearing on the motion to suppress failed to establish that the informant's reliability was sufficient to warrant use of his "tip": (B) he contends that the failure to obtain an arrest warrant vitiates the arrest and subsequent seizure; and (C) he contends that a consent to search cannot be acquired during an illegal detention and that his consent was not shown to be voluntary and knowledgeable.

As to appellant's first contention, the Judge at the suppression hearing found that the informant's reliability had been established by the testimony of In-

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Wellesley Avenue, in West Los Angeles. His credit card number was 4024 682 059 676. Another credit card was sent by BankAmericard through the mails to one Kenneth Sorensen of 12118 Ohio Avenue, in West Los Angeles. His credit card number was 4024 688 038 351." It was further stipulated that the individuals to whom these credit cards were addressed never received the credit card in question.

spector Barbarick and that the reliability standards of *Aguilar,* 378 U.S. 108, and *Spinelli,* 393 U.S. 410, had been met. Inspector Barbarick testified that he had been contacted by Informant Khoury prior to August 17, 1972, on five to ten occasions and that Khoury had related information concerning appellant Watson and his associates and that the information supplied helped in knowing the whereabouts of people that were involved in mail theft throughout the Los Angeles area. There is sufficient evidence to support the trial judge's finding that Khoury was "reliable". Consequently, on August 17, 1972, when Khoury gave Barbarick the credit card which he said he had received from Watson, probable cause existed to arrest appellant Watson for mail theft.

Appellant's second contention has merit, i.e. the failure to obtain an arrest warrant vitiates the arrest. As stated above, Inspector Barbarick had probable cause to arrest appellant on the 17th of August, 1972. However, the arrest was not made until six days later—on the 23rd of August. There appears to be no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant.

"The case of Warden v. Hayden, [387 U.S. 294] where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." *Coolidge* v. *New Hampshire,* 403 U.S. 480. "The warrant requirement is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part

of any system of law enforcement." *Coolidge, supra* at 481. The government in this case has shown no "exigent" circumstances which would justify not obtaining an arrest warrant during the six day interim period between the 17th of August and the day of the actual arrest. The arrest of the appellant was in violation of the 4th Amendment to the U.S. Constitution.

Thirdly, appellant attacks the voluntariness of his consent to search. At the time appellant consented to the search, he was under arrest. Nothing in the record indicates that he knew of or was advised of his right not to consent to the search of his automobile.

At the time of the consent to the search of this car, the law of the Ninth Circuit required a showing that the defendant knew he could withhold his consent and a showing as to whether any consent was coerced or uncoerced. *Schoepflin* v. *United States*, 391 F. 2d 390 (9th Cir. 1968). However, in *Schneckloth* v. *Bustamonte*, 412 U.S. 219 (1973), the Supreme Court, reversing an earlier decision by this court, 448 F. 2d 699 (9th Cir. 1971), held that:

> "* * * Voluntariness is a question of fact to be determined from all of the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. * * *"

Recently, in *United States* v. *Rothman*, 492 F. 2d 1260 (9th Cir., Nov. 27, 1973), this court, conceding that *Schneckloth* is limited by its facts to cases in which the consenting party is not in custody, observed that we have never applied a different test for consent searches on the basis of the pre-consent arrest of the consenting party and held that "arrest is but one

factor, albeit a critical one, in determining whether or not the consent was voluntary." 492 F. 2d at 1264, n. 1. Hence, the Supreme Court's "totality of circumstances" test applies to all consent search situations, whether or not the consenting party is under arrest.

Here, we find that the totality of circumstances strongly suggests coercion. Appellant had been placed under arrest and was in custody at the time that he gave the officers permission to search his car.

> "* * * In looking at the factual issue of voluntariness, the court must be aware of the 'vulnerable subjective state' of the defendant as well as the possibility of 'subtly coercive police questions.' *Schneckloth* v. *Bustamonte*, supra, 412 U.S. at 229, and the inherently coercive nature of custodial interrogation, *Id.* at 247." *United States* v. *Rothman*, 492 F. 2d at 1265.

Not only was appellant Watson in custody, he was in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant. Moreover, in *Rothman*, where we held that the defendant had not properly consented to a search, the defendant admitted that he knew that he had a right to refuse. Here, nothing indicates that Watson knew or was advised of his right not to consent to the search of his automobile. Hence, in light of *Schneckloth* and *Rothman*, we hold that the in-custody search of the appellant was invalid, and the fruits of the search should have been suppressed.

In light of the above it is not necessary to discuss other issues raised.

REVERSED.

GOODWIN, *Circuit Judge*, dissenting: I would affirm. I agree that the agents could have obtained an arrest warrant as early as six days before they arrested Watson, but it by no means follows that the arrest

without a warrant was not lawful. I know of no case which holds that officers must make an arrest the moment they come into possession of enough evidence to cause a magistrate to issue a warrant. *United States* v. *Leon,* 460 F. 2d 299, 300 (9th Cir. 1972). There are many times when good law enforcement commends further investigation. At the time of Watson's arrest, a pre-arranged signal gave the officers new knowledge that Watson was then in possession of additional stolen credit cards. This information alone would have justified a warrantless arrest at the time it was made.

Given a lawful arrest, the only basis Watson urged in the trial court for his motion to suppress the evidence collapses. I do not join in the majority's discussion of *Schneckloth* v. *Bustamonte,* 412 U.S. 219 (1973), as it is not responsive to any issue raised below or in the briefs and arguments on appeal.

APPENDIX B

JUDGMENT

United States Court of Appeals For the Ninth Circuit

No. 73-1539 (D.C. No. 11056)ALS

UNITED STATES OF AMERICA, DEFENDANT/APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT/APPELLANT

[March 20, 1974]

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A true copy, attest:
October 24, 1974.

EMIL E. MELFI, Jr., *Clerk.*
By MARY TURLEY, *Deputy.*

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, APPELLEE

v.

HENRY OGLE WATSON, APPELLANT

[September 5, 1974]

Before ELY and GOODWIN, Circuit Judges, and MURRAY, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX D

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT-APPELLANT

[December 12, 1973]

Appeal from the United States District Court for the Central District of California

Before ELY and GOODWIN, Circuit Judges, and MURRAY,* District Judge

MURRAY, *District Judge:* An indictment was filed against the appellant on September 11, 1972, alleging a four count violation of 18 U.S.C. § 1708 (stealing from the mails). Count 1 alleged a violation on August 23, 1972; Count 2 alleged a violation on August 17, 1972; Count 3 alleged a violation on August 23, 1972; and Count 4 alleged a violation on May 28, 1971. The appellant was ultimately tried on Counts 1, 2 and 3. Count 4 was dismissed. The jury returned a verdict of guilty as to Counts 1 and 3, and not guilty as to Count 2.

On the day of the trial, the district court heard motions to suppress evidence pursuant to Rule 41(e) Federal Rules of Criminal Procedure and a motion to determine the voluntariness of any post-arrest state-

*The Honorable W. D. Murray, United States District Judge for the District of Montana, sitting by designation.

ments pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964). In response to these motions, the government called Frank L. Barbarick, a U.S. Postal Inspector, as a witness. Inspector Barbarick testified that he was contacted on the telephone by one Awad Khoury on August 17, 1972. He knew Khoury as Tony and had previous contacts with him from five to ten times. In the course of these prior contacts, Khoury related information concerning appellant Watson and his associates. This information was found to be reliable by Inspector Barbarick.

In the August 17, 1972, phone call, Khoury advised the Inspector that he, Khoury, was going to receive a Bank of America credit card from appellant Watson. The card was in the name of Syed T. Ahmad. Barbarick told Khoury to bring the credit card to Barbarick's office when he received it from Watson. Later on that day, Khoury brought the credit card into Barbarick's office. Khoury said that he had received this card from appellant and that appellant wanted him to purchase TWA airline tickets. Khoury also showed Inspector Barbarick a slip of paper that gave names and addresses for the airline tickets to be purchased. Inspector Barbarick told Khoury to arrange a meeting with appellant Watson. Khoury advised Barbarick that a meeting was scheduled for August 22, 1972, but this meeting did not take place. A meeting with Watson on August 23 similarly did not take place. Finally, a meeting between Khoury and Watson was set up for noon on the 23rd of August at Ship's Restaurant in Los Angeles. Barbarick testified that he told Khoury to determine at the meeting whether Watson had any additional credit cards in his possession. If Watson did have some additional cards, Khoury was to light a cigarette as a signal to Postal Inspectors inside the restaurant. These inspectors would then activate a signal alerting Inspector Barbarick outside the restaurant. Upon receiving the prearranged signal Barbarick and other inspectors entered the restaurant and placed the defendant under arrest, advising him that he was under arrest for possession of stolen mail. Inspector Barbarick then asked Watson if he could look in his car. Watson said "Go ahead." Using the key to the car which Watson had turned over, Barbarick opened the car and searched. Under the floormat on the driver's side he recovered an envelope. Inspector Barbarick's later testimony indicated that the envelope which he discovered was not opened until he returned to his office in downtown Los Angeles. At that time he found that two smaller envelopes were contained inside the larger envelope and that it was these two envelopes which contained the credit cards which are the source of the allegations in Counts 1 and 2. In making the arrest the inspector testified he was relying on the evidence acquired on August 17, 1972, which was six days prior to arrest.

In his initial argument, appellant raises the strictly technical point that a stipulation [1] which his attorney and the U.S. Attorney intended to introduce was never

[1] The stipulation read as follows: "That on or about August 14th of 1972, BankAmericard Corporation sent through the mails three credit cards in separate envelopes, with separate addresses on them. That these three separate and distinct credit cards and envelopes were addressed to, number one, a Marlene M. Steinberg, at 12407 Ohio Avenue in Los Angeles. And that her credit card number was 4024 681 187 691. In addition, another credit card on or about August 14, was sent by BankAmericard to one Syed T. Ahmed. And that was sent to 1502 Wellesley Avenue, in West Los Angeles. His credit card number was 4024 682 059 676. Another credit card was sent by BankAmericard through the mails to one Kenneth Sorensen of 12118 Ohio Avenue, in West Los Angeles. His credit card number was 4024 688 038 351." It was further stipulated that the individuals to whom these credit cards were addressed never received the credit card in question.

affirmatively or competently entered into or accepted by the court and that, consequently there is an absence of proof.

The record reveals that both parties, the court and the jury all were under the impression that the stipulation had been entered in the record. The agreement to stipulate was communicated to the court prior to the empanelling of the jury. The stipulation was read to the jury in the government's opening statement. The defense counsel referred to the stipulation during his cross-examination. The appellant himself made reference to the stipulation. Since all parties concerned were under the impression that the stipulation had been entered in the record, the defendant-appellant cannot be allowed to benefit from a purely technical error, if in fact there was error.

Appellant next contends that (A) the hearing on the motion to suppress failed to establish that the informant's reliability was sufficient to warrant use of his "tip"; (B) he contends that the failure to obtain an arrest warrant vitiates the arrest and subsequent seizure; and (C) he contends that a consent to search cannot be acquired during an illegal detention and that his consent was now [sic] shown to be voluntary and knowledgeable.

As to appellant's first contention, the Judge at the suppression hearing found that the informant's reliability had been established by the testimony of Inspector Barbarick and that the reliability standards of *Aguilar,* 378 U.S. 108, and *Spinelli,* 393 U.S. 410, had been met. Inspector Barbarick testified that he had been contacted by informant Khoury prior to August 17, 1972, on five to ten occasions and that Khoury had related information concerning appellant Watson and his associates and that the information supplied helped in knowing the whereabouts of people that were involved in mail theft throughout the Los

Angeles area. There is sufficient evidence to support the trial judge's finding that Khoury was "reliable". Consequently, on August 17, 1972, when Khoury gave Barbarick the credit card which he said he had received from Watson, probable cause existed to arrest appellant Watson for mail theft.

Appellant's second contention has merit, i.e. the failure to obtain an arrest warrant vitiates the arrest. As stated above, Inspector Barbarick had probable cause to arrest appellant on the 17th day of August, 1972. However, the arrest was not made until six days later—on the 23rd of August. There appears to be no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant.

"The case of Warden v. Hayden, [387 U.S. 294] where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." *Coolidge* v. *New Hampshire,* 403 U.S. 480. "The warrant requirement is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of any system of law enforcement." *Coolidge, supra* at 481. The government in this case has shown no "exigent" circumstances which would justify not obtaining an arrest warrant during the six day interim period between the 17th of August and the day of the actual arrest. The arrest of the appellant was in violation of the 4th Amendment to the U.S. Constitution.

Thirdly, appellant attacks the voluntariness of the consent to search. At the time appellant consented to the search, he was under arrest. Nothing in the record

indicates that he knew of or was advised of his right not to consent to the search of his automobile. At the time of the consent of the search of this car, the law of the Ninth Circuit required a showing that the defendant knew he could withhold his consent and a showing as to whether any consent was coerced or uncoerced. *Schoepflin* v. *U.S.*, 391 F. 2d 390 (1968). The record in the Schoepflin case was similar to the record in the case at hand in that "there is not a word of testimony in the record to indicate that Smith was aware of the fact that he could refuse to permit the requested search of his apartment." *Schoepflin, supra* at 399. The Supreme Court has since partially overruled this Ninth Circuit requirement. In the decision of *Schneckloth* v. *Bustamonte,* 41 U.S.L.W. 4726 (1973), the court held that "when the subject of a search is *not in custody* and the state attempts to justify a search on the basis of his consent" there is no necessity of showing that the defendant knew or was advised of his right not to submit to the search. The Ninth Circuit requirement of a showing of knowledge of the right to refuse has been overruled only in the context of out-of-custody searches. The court in *Schneckloth* reiterates the Miranda holding that custodial interrogations by the police are inherently coercive and consequently, detailed warnings are required. Not only was appellant Watson in custody, he was in custody in violation of the 4th Amendment since the agents had failed to obtain an arrest warrant. The totality of the circumstances certainly suggests coercion. In light of the Ninth Circuit law at the time of the consent, *Schoepflin,* and the *Schneckloth* case, the in-custody search without appropriate warnings must be declared invalid. The fruits of the search should have been suppressed.

The case at hand is distinguishable from *U.S.* v. *Iron and Lyon* (9th Cir. #72-2595 and 2596) decided

by this court on July 26, 1973. In the *Iron* decision, the consent to search was made prior to any arrest. It was an out-of-custody consent and thus, under *Schneckloth,* the prosecution was not required to demonstrate knowledge of a right to refuse.

In the *Iron* decision, *U.S.* v. *Page,* 302 F. 2d 81, 84 (9th Cir. 1962) was cited for the proposition that appellate courts usually sustain a trial court's finding that there was consent to a search, even though the consent was obtained under authority of the badge, and the government must show that there was no coercion in fact. It should be noted, however, that in *Page* we went on to say, "The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." *Page* at 84. We hold that in an in-custody situation, the prosecution must show that a defendant either knew of, or was advised of his right to refuse to consent to a search.

In view of the above it is not necessary to discuss other issues raised.

REVERSED.

GOODWIN, *Circuit Judge,* dissenting: I would affirm. I agree that the agents could have obtained an arrest warrant as early as six days before they arrested Watson, but it by no means follows that the arrest without a warrant was not lawful. I know of no case which holds that officers must make an arrest the moment they come into possession of enough evidence to cause a magistrate to issue a warrant. There are many times when good law enforcement commends further investigation. At the time of Watson's arrest, a prearranged signal gave the officers new knowledge that Watson was then in possession of additional stolen credit cards. This information alone would have justified a warrantless arrest at the time it was made.

Given a lawful arrest, Watson's only basis for his motion to suppress the evidence collapses.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
APR 4 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-538

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-538

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

No. 11056

THE UNITED STATES

vs.

HENRY OGLE WATSON

Date	*Proceedings*
9/11/72	Ent ord for flg Indict & fxg bail at $3,500. P/R. Fld. Indict. Md. JS-2 (MML). Fld $3,500.00 P/R bond posted 8/23/72 bef U.S. Mag. Ralph J. Geffen at L.A., Calif. Fld Not of Flg Bond.
10/ 2/72	Crt appts Fed Pub Def Land Wayland as cnl for deft. Fld deft's stmt of Constitutional Rights. Deft Arr & T/N as chgd. Crt ords this case assigned to the Cal of Judge Stephens and cont matter to 2pm this date for fur prcdgs. (Mag RJG).
10/ 2/72	Arr, Plea & Setting For Trial: Ent plea of Not Guilty all cts. Deft duly arr & states his true name is as shown on the Indict. Ord case set for trial 10/25/72 9:30am. (ALS)
10/19/72	Fld Pltf's Trial Memo. Fld Govt's Proposed Jury instructions.
10/25/72	Ord motns of deft to suppress evid & stmt are Denied. Fld substitn of Attys Michael Nasatir in place of Land Wayland. Fld order shortening time & hear motn to suppress. Fld Motn to suppress & for cont of trial. Fld suppl pts & auths on Motn to Suppress JURY TRIAL (1st Day) Sw wits, Imp Jury, govt mks open stmt. mkd exhbts, ord cont to 10/26/72, 9:30 am for fur J/T. (ALS).
10/26/72	JURY TRIAL (2nd Day) deft moves to suppress certain exhbts & the Crt Denies. All pres, govt rests. Deft moves for judgmt of acquittal and Mistrial and Crt denies both motns. Both sides rest. Govt moves for a Crt ord for an exemplar of deft's handwriting or printing and the Crt grants said motn but after deft's opposition of Crt's ruling, the Crt now denies said motn. Ord case cnt to 10/27/72, 9am for fur J/T. Sw wits & fld exhbts. (see separate list)

10/27/72	FUR JURY TRIAL (3rd Day): Both sides argue. All pres including the jury. Jury taken to lunch at Govt expense, by bailiff John Contos & Nick Robertson. Jury retires to deliberate. Crt convenes w/o jury & deft mvs for mis-trial & the Crt denied said motn. The Crt excused the alternate & sw bailiff, John Contos. Jury retires to deliberate. Rec'd note from jury foreman stating jury wants reporter's notes read. The Crt excused the jury until 9am 10/30/72 & ords case cont for fur trial to that time. (ALS)
11/ 6/72	Fld Notc of Motn & Motn for new trial retnble 11/13/72, 2pm.
10/30/72	FUR JURY TRIAL (4th Day): Reporter reads a portion of the notes to the jury which is pres in the box. Jury retires, to resume deliberation. Note from Jury Foreman read stating jury has reached a Verdict. Clerk reads Verdict of Guilty to cts 1 & 3 & N/G to ct. 2. Ord case set for sent cts 1 & 3 11/13/72 at 2 pm. (ALS)
11/13/72	Fld NOTICE OF APPEAL of deft Henry Ogle Watson and paid $5.00 flg fee as cnsl retained. Issd copies to (ALS), U.S. Atty, U.S. Mars, P/O, deft Henry Ogle Watson, Adm Clerk, File & orig & 2 copies to Appeals Section.
11/13/72	Fld Mot & Not of Mot of deft Henry Ogle Watson for bail pending appeal with affids in suppt, & pts & auths. (No retnble date shown & bail given in Court)
11/13/72	Fld $2,500.00 P/R Bond on APPEAL as to deft Henry Ogle Watson posted 11/13/72 bef & approved by Edw. F. Drew placing said deft on bond on appeal pending appeal. Issd abstr to U.S. Mars.
	SENT: 3 yrs on each of cts 1 & 3 to run concurr. Purs to 18/4208(a)(2). Deft speaks, his cnsl speaks & deft is advised of his right to appeal appeal purs to Rule 32 (a)(2) FRCP. Crt recommends consideration for early parole taking his military service & educational background into consid Fld Judgmnt & issd copies. Ent 11/15/72 Md JS-3 as to deft Watson. (ALS) Deft moves for court to set bail on appeal. Crt ords P/R bond in amt of $2,500.00 P/R set on deft outcome of his appeal. (ALS)
11/21/72	LODGED NOTICE OF APPEAL as to deft Henry Ogle Watson & Orders in Criminal Forma Pauperis cases with Designation of Record of Appeal & Ord (UNSIGNED) for deft to proceed In Forma Pauperis. (See Notice of Appeal above fld 11/13/72).
11/28/72	Fld Order (ALS) dismissing count 4 of the Indictment as to deft Henry Ogle Watson. (Watson found guilty as to counts 1 & 3 & Not Guilty as to count 2 on 10/30/72.) Issd copies.
2/ 5/73	Fld ord denying mot for lv to appeal informa pauperis and cert. Mld copy to deft's counsel and to AUSA. (ALS)
2/13/73	Fld NOTC OF APPEALS AS TO DEFT Watson from the ord denying motn for lv to appeal in forma pauperis & issd cpys to Judge ALS, U.S. Atty, U.S. Mars, U.S.P.O., Deft & Cnsl (retained) Adm. Clerk & Orig & 2 copies to Appeal Clerk.

3/29/73	Rec'd fr C/A cc of ord of C/A permtg pauper appeal (gave cy to Ct Rptr ET)
3/30/73	Fld Order nunc pro tunc. Ord that ord of 2/5/73 is hereby and nunc pro tunc to contain the within clarifications of the evid adduced at trial (See nunc pro tunc ord. (ALS)
6/13/73	Fld desig of record on appeal.
1/ 8/74	Rec'd fr C/A orig rec on appeal along with pltf's exhbts 1 thru 6 and orig rptr's transcript of prdgschad on Oct. 25, 26, 27, 1972 (1 vol) Mld recpt. Rec'd fr C/A cc of jdgmnt of C/A reversing jdgmnt of USDC (gave to Ct Clerk CJ)
1/15/74	Returned per request of C/A cc of C/a revrsng jdgmnet of USDC.
9/17/74	Rec'f fr C/A cc of jdgmnt of C/A revsng jdgmnt of USDC (gave to Ct Clerk CJ) Mld recpt.
10/24/74	Ord flg & sprdg of jdgmt of US Court of Appeals revers jdgmt in this court be placed on cal for hrg 11/4/74 at 9:30 AM (ALS) jk
11/ 4/74	Ord hrg & flg of jdgmt of the USCA reversing the jdgmnt of this court. Fld & ent 3/20/74 cont to 11/25/74 at 9:30 AM. (ALS) jk
12/ 2/74	Rec'd frm C/A cc order denying Motion for Withdrawal of Mandate for Stay of Mandate (cy to CJ)
1/ 6/75	Ord hrg on spreading judgment of USCA cont to 3-31-75, 9:30 am. (ALS) jp

Docket From United States Court of Appeals

No. 73-1539

Date	*Proceedings*
3/27/73	Filed order (C) granting appellant leave to proceed with appeal in forma pauperis. The retained trial attorney will be appointed to represent appellant in this court. The attorney and the reporter are directed to execute and return forthwith CJA Form 21 for authorization of a reporter's transcript. (jn)
3/27/73	Filed order (C) appointing counsel Michael D. Nasatir, to represent appellant.
3/27/73	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL (jn)
3/27/73	Filed CJA 21 (C) authorizing preparation of transcript. (jn)
5/25/73	Recvd. orig. & 3 applt's motion for ext of time to file opening brief to C. (rg)
5/29/73	FILED MOTION AND ORDER (C) EXTENDING TIME TO file & transmit the record on appeal to JUNE 14, 1973 & brief is due 14 days thereafter. (DUE DATE) JUNE 28, 1973. *IT IS NOTED THAT CJA FORM 21 WAS FILED ON MARCH 27, 1973.* (rg)

6/15/73	FILED CERT RECORD ON APPEAL IN FOUR VOLUMES: VOL. I, PLEADINGS; ORIG. & THREE COPIES: VOL. II, REPORTER'S TRANSCRIPT; ORIG. & THREE COPIES: VOL. III, REPORTER'S TRANSCRIPT; ORIG. & THREE COPIES: VOL. IV, REPORTER'S TRANSCRIPT: ORIG. & THREE COPIES. *FILED ORIGINAL EXHIBITS IN LPS* •
6/19/73	Sent copy of four volume record to Appellant Counsel.
6/19/73	Appellant's Brief due July 29, 1973.
	Calendar Case for Hearing for October, 1973, Los Angeles
7/31/73	FILED 4 APPELLANTS BRIEFS
9/ 5/73	FILED 25 APPELLEES BRIEFS (to panel) abs
10/ 1/73	ARGUED & SUBMITTED TO: ELY, GOODWIN, CJJ, MURRAY, DJ (jn)
12/12/73	ORDERED OPINION (MURRAY) & DISSENTING OPINION (GOODWIN) FILED & JUDG TO BE FILED & ENTD (jn)
12/12/73	Filed opinion—reversed
12/12/73	Filed & Entered Judgment (jn)
1/ 4/74	1974 ORIGINAL FILES & EXHIBITS RTD.
1/ 4/74	1974 JUDGMENT ISSUED TO CLERK U.S.
1/ 8/74	Rec'd orig & 3 appellee's motion for ext. of time to file pet for rehearing and rehearing en banc in excess of 15 pgs. To: E,G,CJJ, *Murray*, DJ th
1/15/74	RECEIVED RECEIPT for judgment and records
1/14/74	Filed Order (Ely) granting an ext of time to January 25, 1974 for filing petition for rehearing & rehearing en banc; further Ordered that said petition may exceed fifteen (15) pages in length by no more than ten (10) pages. cs
1/15/74	Called Dist Ct for the return of certified copy of mandate (Scovil) rh
1/16/74	Recvd. certified copy of mandate from Clk, Dist Ct. rh
1/18/74	Recvd. appellee motion for recall of mandate (not submitted to court—mandate recalled 1/15 pursuant to order of 1/14) rh
1/28/74	Filed orig & 3 appellee's motion for extension of time in which to file petition for rehearing. To: E, G, CJJ, Murray, DJ th
2/ 1/74	Filed order (Ely) granting appellee's motion for ext. of time to Feb. 11, 1974 in which to file petition for rehearing. th
2/13/74	Filed orig & 24 appellee's petition for rehearing with suggestion for rehearing en banc. To: ALL ACTIVE JUDGES. th
3/ 8/74	Filed Order (Ely, Goodwin & Murray) withdrawing the court's opinion filed 12/12/73. cs Prepared JS-34 Re-opened case (jn)
3/20/74	ORDERED OPINION (MURRAY DJ) FILED & DISSENTING OPINION GOODWIN FILED & JUDG TO BE FILED & ENTD (jn)

3/20/74	Filed opinion—reversed
3/20/74	Filed & Entered Judgment (jn)
3/20/74	Filed Order (Ely, Goodwin & Murray) dismissing appellee's petition for rehearing with suggestion for rehearing en banc as moot. cs
4/ 1/74	Filed orig & 3 copies aple's motion for ext of time to file petition for rehearing & rehearing en banc in excess of fifteen pages. TO: E G Murray gb
4/10/74	Filed Order (E) granting aple's an ext of time to and including April 26, 1974, to file petition for rehearing & suggestion for rehearing en banc in excess of fifteen pages. gb
4/29/74	Filed aple motion for ext of time to file petition for rehearing & suggestion for rehearing en banc. TO: E G Murray gb
4/30/74	Recvd aple petition for rehearing & suggestion for rehearing en banc. TO: E G Murray pending directions from panel. gb
5/ 2/74	Filed Order (E) granting aple's an ext of time to and including May 1, 1974, to file petition for rehearing and rehearing en banc. It is further Order that said petition shall not exceed twenty-five (25) pages in length. gb Per telephone call with Ely, ok to file petition consisting of 27 pages.
5/ 2/74	Filed aple's petition for rehearing with suggestion for rehearing en banc. TO ALL ACTIVE JUDGES gb
9/ 5/74	Filed order (E, G & Murray) denying the petition for rehearing and rejecting the suggestion for rehearing en banc. jr
9/16/74	ISSUED JUDGMENT
10/ 7/74	Recvd. S.C. notice re: ext of time to Nov. 4th in which to file pet for writ of Cert rh
11/ 7/74	Filed aple's motion for withdrawal of previously issued mandate and for stay of mandate to (Ely, Goodwin & Murray). jr
11/18/74	Filed SC notice re: filing pet for cert 11/4/74 SC #74-538.
11/21/74	Filed order (Ely, Goodwin & Murray) the aple's motion for withdrawal of mandate, for stay of mandate, etc., is denied. jr
2/24/75	Filed certified copy of SC order granting pet for writ of cert 2/18/75 (panel) rh

United States District Court for the Central District of California

September 1972 Grand Jury

No. 11056 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

HENRY OGLE WATSON, DEFENDANT

Indictment—18 U.S.C. § 1708: Possession of Stolen Mail

The Grand Jury charges:

COUNT ONE

(18 U.S.C. § 1708)

On or about August 23, 1972, in Los Angeles County, within the Central District of California, defendant HENRY OGLE WATSON unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Marlene M. Steinberg at 12407 Ohio Avenue, West Los Angeles, CA. 90025, and at said time and place defendant well knew said contents of said letter had been stolen.

COUNT TWO

(18 U.S.C. § 1708)

On or about August 17, 1972, in Los Angeles County, within the Central District of California, defendant HENRY OGLE WATSON unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Syed T. Ahmad at 1502 Wellesley Avenue, West Los Angeles, CA. 90025, and at said time and place defendant well knew said contents of said letter had been stolen.

COUNT THREE

(18 U.S.C. § 1708)

On or about August 23, 1972, in Los Angeles County, within the Central District of California, defendant HENRY OGLE WATSON unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Kenneth Sorenson at 12118 Ohio Avenue, West Los Angeles, CA. 90025, and at said time and place defendant well knew said contents of said letter had been stolen.

COUNT FOUR

(18 U.S.C. § 1708)

On or about May 28, 1971, in Los Angeles County, within the Central District of California, defendant HENRY OGLE WATSON unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Issac F. Lenix at 1003 East Kau, Compton, CA. 90221, and at said time and place defendant well knew said contents of said letter had been stolen.

A True Bill

_____ _____,

Foreman.

WILLIAM D. KELLER,
United States Attorney.

RELEVANT PORTIONS OF TRANSCRIPT OF TRIAL OF OCTOBER 25, 1972

4 The COURT. Good morning, gentlemen.

Mr. NASATIR. Good morning, Your Honor.

Mr. KENNEY. Good morning, Your Honor.

The CLERK. Case No. 11056, United States of America vs. Henry Ogle Watson.

Mr. KENNEY. Your Honor, Michael Kenney for the Government in this matter.

Mr. NASATIR. Your Honor, Michael D. Nasatir for the defendant, Mr. Watson, in this matter.

Mr. KENNEY. Your Honor, may I address the Court?

The COURT. Yes.

Mr. KENNEY. Your Honor, the Assistant United States Attorney who is handling this case is Curtis Rappe, who has been handling it. He has been delayed in a trial before Judge Williams, that was supposed to end yesterday at noon. He has requested that this case before Your Honor trail the case in Judge Williams' court. I have not had a chance to prepare for it and it wasn't until late yesterday afternoon that I was informed that there might be a conflict.

The COURT. Well, this is the date set for trial. I think we better go to trial today. It is not a very complicated case. I am sure you can handle it.

Mr. NASATIR. May I make a suggestion, Your Honor?

5 The COURT. Yes, sir.

Mr. NASATIR. Your Honor, I filed a motion to suppress in the matter. If I could suggest, Your Honor, I think there is—if we could try the motion to suppress today, possibly giving the Assistant United States Attorney the morning or however long he needs to interview his witnesses and continue the trial in this matter, Your Honor. I think there is a possibility of two things happening if the motion is denied—which I don't know if it will be or not. And I represent to the Court that there is a good possibility of either a disposition being worked out, which will take some time to iron out details or a jury waiver on the part of the defendant.

I think this will accommodate the Court and I think it will take—we might even be able to stipulate, Your Honor, if we go further than the motion, that the case be heard on the facts elicited at the motion to suppress.

The COURT. Well, that is all right. Let's get on with the motion to supress.

I will give you until 10 o'clock to look it over and talk to your witnesses. All we need are the facts and I am sure it is not very complicated. If it proves to be more complicated than that, I will take that up at the time.

Mr. KENNEY. I may not be trying the case in that respect.

I was just sent down on this matter to bring it before the

6 Court's attention. I have another trial before Judge Lucas, and I am right now appealing a decision of his on a motion to suppress that he put in yesterday.

If Your Honor wants this case tried today, I am sure he will have someone from our office to try it.

The COURT. Well, it is only going to take—it won't take more than a day, in any event, it doesn't seem to me, so if you have the day free, why don't you try it?

Mr. KENNEY. Maybe I will do that and see if we can assign the other duties to someone else.

The COURT. We will take a recess until 10 o'clock.

Mr. NASATIR. Your Honor, I am not objecting to a continuance, I realize his problems.

The COURT. No, I realize that.

Mr. NASATIR. He did call me last night and I do realize the problem.

The COURT. No, I think that we ought to go to trial on it now.

Mr. WAYLAND. Your Honor, one further matter. The Federal Public Defender's office was initially appointed in this matter and we were substituted out a little over a week ago. I just wanted the Court to——

The COURT. I did not sign the substitution, because I didn't want to get trapped in a position that would have a motion made for a continuance on that basis. But I will if

7 Mr. Nasatir is ready to go.

Mr. NASATIR. Yes, Your Honor. And, believe me, my motion for a continuance is only based upon a trial that was scheduled to go yesterday. I filed my motions. I am ready to go, except for that trial.

The COURT. All right.

Mr. NASATIR. I thought my motion was in in plenty of time. I certainly want to assure the Court that there is no hanky-panky.

The COURT. We will proceed with it now, and I will sign the substitution.

Mr. WAYLAND. Thank you very much, Your Honor.

The COURT. All right.

Mr. KENNEY. Your Honor, may I address the Court?

The COURT. Yes.

Mr. KENNEY. At 10 o'clock, do you want us to go ahead on the hearing for the motion to suppress; is that correct, Your Honor?

The COURT. Yes.

Mr. KENNEY. I might have difficulty filing some counter Points and Authorities.

The COURT. Never mind the Points and Authorities. I think the motion is simple enough on the law. If we get the facts, why, the law will fall into shape, I think.

Mr. KENNEY. Thank you, Your Honor.

8 The COURT. All right.

[Brief recess taken.]

The COURT. All right, gentlemen.

Mr. KENNEY. Your Honor, at this particular hearing, the Government would like to call Postal Inspector Frank L. Barbarick to the stand, if the Court please.

The COURT. All right, sir.

Mr. NASATIR. Your Honor, at this time we would like to ask for the exclusion of all percipient witnesses.

The COURT. The motion is granted.

Now, are there any other witnesses in the room?

Mr. KENNEY. I would ask the case agent to be allowed to be with me. If Your Honor please, I believe that is allowed, but I will exclude all other possible witnesses.

The COURT. All right.

For the record, this is a hearing on the motion to suppress.

MOTION TO SUPPRESS

Frank L. Barbarick, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The CLERK. What is your full, true name, sir?

9 The WITNESS. Frank L. Barbarick, B-a-r-b-a-r-i-c-k.

DIRECT EXAMINATION

By Mr. KENNEY:

Q. Inspector Barbarick, could you state with whom you are employed, please?

A. Postal Inspector assigned to Los Angeles.

Q. How long have you been so employed?

A. Approximately two and a half years.

Q. Now, prior to your employment as a Postal Inspector, what was your occupation, sir?

A. Police Officer.

Q. For Los Angeles?

A. No, I was a Police Officer with the City of San Fernando, approximately 15 years, and then I went up North to Oregon as a Police Officer.

Q. How long were you a Police Officer up there?

A. Two years I was up there.

Q. Directing your attention to August the 17th of this year, did you have occasion to talk with one Awad Khoury?

A. I did.

Q. What was the occasion that you spoke with him on; how did that conversation initiate?

A. By telephone.

10 Q. Who called whom?

A. Mr. Khoury called me.

Q. Prior to this occasion, had you had any contact with Mr. Khoury?

A. Yes, a number of times he called——

Q. About how many times, Officer?

A. Over five times—between five and ten times, I would say.

Q. Were you familiar with his voice?

A. Yes, I was.

Q. When he called you, did he identify himself?

A. Yes, he said, "This is Tony."

Q. Is Tony the name that he generally used in talking with you?

A. Yes, it was.

Q. Did you, independent of the fact that he gave a name, recognize his voice?

A. Yes, I did.

Q. On this occasion, about what time was this on the 17th that he called you?

A. Early afternoon.

Q. Where were you at this time?

A. In my office.

Q. Where is your office located?

11 A. At Fifth and Spring, second floor, in the old Edison Building.

Q. When he called you, what, if anything, did he say?

A. He stated that he had a Bank of America credit card that had been turned over to him or given to him by a Henry Watson.

Q. Did——

A. No, I am sorry. He stated that he was going to receive a Bank of America card from Henry Watson, that was it, at that time.

Q. Did he tell you what the number was on that credit card?

A. No, he just gave me a name at that time.

Q. And what name was that?
A. It was—do you mind if I go through my notes?
Q. No, I have no objection if you refresh your memory from your notes.
A. Syed T. Ahmad, I believe it is pronounced, A-h-m-a-d.
Q. All right.
What did he say? Where did Mr. Khoury say he was going to get this credit card?
A. From Mr. Watson.
Q. Did he give a full name for Mr. Watson?
12 A. Henry, I said, "Do you mean Henry Watson?" and he said, "Yes."
Q. Did you know Henry Watson at this time?
A. Yes, I knew Henry Watson.
Q. What was your nature of the prior contact with Mr. Watson?
A. I had arrested Mr. Watson prior to this charge.
Q. On what charge?
A. Possession of stolen mail.
Q. And how long ago was this?
A. It is over a year.
Q. Has any other governmental or police agency arrested Mr. Watson, to the best of your knowledge?
Mr. NASATIR. Objection, hearsay, Your Honor.
The COURT. Sustained.
By the WITNESS:
A. Yes.
Mr. NASATIR. Your Honor, I move that the answer be stricken.
The WITNESS. I am sorry.
The COURT. The answer will go out.
By Mr. KENNEY:
Q. Could you repeat, again, when it was that you arrested Mr. Watson for possession of stolen mail?
13 A. It was over a year or so prior to the time that he called me or made contact. It was 1971.
Q. What, if anything, did you tell Mr. Khoury concerning the credit card in question?
A. What did I tell Mr. Khoury?
Q. Yes. Did you give him any instructions?
A. Yes.
Q. What did you tell him, sir?

A. He stated that Mr. Watson was going to turn the credit cards over to him. I told him at the time to take the credit card and immediately bring it to me at my office or contact me.
Q. Did Mr. Khoury state when he was planning on getting this credit card?
A. Later on that day.
Q. Later on that day, did you have another occasion to see Mr. Khoury or talk to Mr. Khoury?
A. I did.
Q. What was that occasion?
A. Later on towards evening after dark, he came to my office, at this time turned over the credit card to me.
Q. What time would this have been, just approximately?
A. Approximately 7:00—between 7:00 and 7:30, I believe, right around that time. It was after dark, I remember
14 that.
Q. When he turned this credit card over to you, what number was on that credit card? It was a BankAmericard credit card?
A. Yes, sir.
Q. What number was that?
A. May I refresh my memory?
Q. Yes.
A. I have a card here, the number is 4024 682 059 676, good through 08–73, in the name of Syed, S-y-e-d, T, middle initial, Ahmad, A-h-m-a-d.
Q. Is that the credit card that was given to you on the 17th of August by Mr. Khoury?
A. Yes, I have my initials and the date on the card.
Q. Your initials are on the card?
A. Yes.
Q. What, if anything, did you do to determine whether or not that credit card was in fact stolen or missing?
A. Along with Inspector Higgins, we contacted the Bank of America credit card section and it was determined at that time that the card was mailed, but never received by the customer.
The BankAmericard section told you this that that card had been mailed, but never received by the customer?
15 A. Yes, I believe it was around August 14th or somethink like that.

Q. That the credit card had been mailed on?

A. Yes.

Q. What, if anything, did Mr. Khoury tell you about when you received that credit card at this later meeting?

A. He stated that he had received the credit card from Mr. Watson, and that Mr. Watson wanted him to purchase some airline tickets, TWA airline tickets. He showed me at the time a slip of paper with some handwriting on it, that gave names and places for the airline ticket to be purchased.

Q. Did Mr. Khoury say anything about the possibility of purchasing additional credit cards?

A. Well, yes. That Mr. Watson could furnish him with additional cards, yes.

Q. Had it been agreed upon between Mr. Watson and Mr. Khoury that Mr. Watson would furnish additional credit cards?

A. Yes.

Q. What arrangements were made in that regard?

A. Well, Mr. Khoury stated that he could—Mr. Watson stated that he could obtain credit cards and turn them over to Mr. Khoury to be used in purchasing merchandise,
16 like TWA airline tickets and clothing and so on.

Q. Was Mr. Watson actually selling the credit card or was he having Mr. Khoury obtaining goods and services for it and then splitting the profits?

Mr. NASATIR. Objection, Your Honor, it assumes facts not in evidence. These are Mr. Khoury's statements admitted for probable cause only, I take it.

Mr. KENNEY. Your Honor, I am just——

The COURT. I don't understand your objection. Will you make it clearer?

Mr. NASATIR. Yes, Your Honor.

I am objecting mainly to the form of the question in that the prosecutor——

The COURT. The question was leading, but I have——

Mr. NASATIR. Well, a lot of the questions are leading, Your Honor, and I am trying to save time by not objecting. But I will object on that basis and I will also object on the basis that the question was: Did Mr. Watson say—if that were a fact. I think the question should be, what did Mr. Khoury say about something.

The COURT. I agree.

Mr. KENNEY. I will rephrase the question, Your Honor. Thank you.

17 By Mr. KENNEY.

Q. Did Mr. Khoury state to you, Inspector Barbarick, what the agreement was between Mr. Khoury and Mr. Watson?

A. On the airline tickets he was to purchase the airline tickets and he would be reimbursed for his time and efforts by Mr. Watson for purchasing them.

Q. At this later, in the evening, August 17th meeting, did Mr. Khoury tell you what arrangements had been made, in order to get additional credit cards?

A. Only that he could obtain additional credit cards from Mr. Watson.

Q. And what did you tell Mr. Khoury in this regard?

A. I told Mr. Khoury to set up a meeting with Mr. Watson.

Q. And did he set up a meeting?

A. He did.

Q. And when did he contact you concerning this meeting?

A. On the 21st. He contacted me in reference to setting up a meeting and the meeting was set up for the 22nd.

Q. This would be the 21st and 22nd of August?

A. Yes.

Q. Where was the August 22nd meeting set up for?

A. At the Ramada Inn, just off Century, close to the airport.

18 Q. Who was to attend that meeting?

A. Mr. Khoury, Mr. Watson and Postal Inspector Denise Roos was to accompany Mr. Khoury.

Q. How were they to meet out there?

A. They were to meet in the cocktail lounge.

Q. Did in fact the meeting take place on the 22nd?

A. No, it did not.

Q. And why did a meeting not take place?

A. Mr. Khoury talked to Mr. Watson——

Mr. NASATIR. Object, Your Honor, same objection.

The COURT. Yes, sustained.

Mr. NASITIR. It assumes facts not in evidence.

By Mr. KENNEY:

Q. Did Mr. Khoury tell you whether or not a meeting took place that day?

A. He stated no meeting took place. Of course, we were at the motel, ourselves.

Q. Did Mr. Khoury tell you why a meeting did not take place?

A. He stated that they had received a call from Mr. Watson, that he couldn't meet them that day, that he would meet them the next morning on the 23rd.

Q. And where was the 23rd meeting to be held?

A. The same place, the Ramada Inn.

19 Q. On the 23rd of August, what were the circumstances of the meeting and where was it to be held?

A. In the cocktail lounge.

Q. At the Ramada Inn?

A. At the Ramada Inn, yes.

Q. What time was that meeting to be held?

A. In the morning around 10 o'clock a.m.

Q. Did Mr. Khoury tell you whether or not a meeting did take place?

A. Yes, no meeting took place.

Q. And did Mr. Khoury tell you why a meeting did not take place?

A. That he had stated that he had talked to Mr. Watson and Mr. Watson wanted him to meet with him at Ship's Restaurant on South La Cienega Boulevard.

Q. On what date was this, according to Mr. Khoury, that this meeting was to take place?

A. The same day, the 23rd.

Q. The 23rd?

A. Yes.

Q. Later on in the day—strike that, please.

What time was the meeting to take place on the 23rd at Ship's Restaurant?

A. Around noontime.

20 Q. Who was to be involved in the actual meeting?

A. Just Mr. Khoury. Mr. Watson did not want the Postal Inspector at the time, Denise Roos.

Q. Mr. Khoury told you that?

A. Yes. He stated that he did not want to meet the girl at that time. He wanted to talk to Mr. Khoury and he would bring the stuff with him.

Q. Were you at the Ship's Restaurant on August 23rd?

A. I was parked on La Cienega Boulevard approximately 75 yards.

Q. Were there other officers of the Postal Service with you?

A. Yes.

Q. Who was with you?

A. Inspector Higgins, Cooper and Inspector Gillespie, who accompanied Inspector Roos inside the restaurant, Ship's Restaurant.

Q. Who were the two postal officers who were inside the actual restaurant.

A. Inspector Gillespie and Inspector Roos.

Q. Did you see Mr. Watson drive up to the restaurant in question?

A. I did not, no.

Q. Did other agents under your control and command

21 inform you that he had in fact driven up?

Mr. NASATIR. Objection, hearsay.

The COURT. Overruled.

By the WITNESS:

A. Well, if I may explain. We had a prearranged signal, that when Mr. Watson entered the restaurant and the informant found out if he had in his possession stolen mail, that he was to signal the inspectors inside the restaurant. At this time they were to alert us by activating a beeper signal that would come over our radio.

By Mr. KENNEY:

Q. How would Mr. Khoury—I presume you are referring to him as the informant—what was this prearranged signal with the postal inspectors inside of the restaurant?

A. To light a cigarette.

Q. And what was that signal to indicate?

A. That Mr. Watson was in possession of stolen mail.

Q. And was such a signal made on the day in question?

A. It was.

Q. Who was the signal made to? In other words, which of the officers under your control and command saw Mr. Khoury light a cigarette?

A. It would be Inspector Roos and Inspector Gillespie.

Q. And what were Inspectors Roos and Gillespie to do

22 based upon this?

A. Inspector Roos would activate the beeper. At that time a signal would be heard over our circuit or radio.

Q. Would all of the inspectors and special employees receive this signal?

A. That were in that immediate area, they would, yes.

Q. And what action did you take upon this signal?

A. I immediately proceeded to the restaurant.

Q. What happened when you got to the restaurant?

A. I went into the restaurant and I served Mr. Watson and placed him under arrest.

Q. And when you placed him under arrest, did you at that time tell him what he was under arrest for?

A. For possession of stolen mail. I removed him from the restaurant at that time.

Q. And where did you take him to?

A. Right directly outside the restaurant.

Q. And what was your purpose in doing that?

A. Well, it was crowded and a lot of activity—people started getting excited, so we moved him out, so it would calm things down inside the restaurant.

Q. When you got him outside, what, if anything, did you do?

A. I advised him of his constitutional rights.

23 Q. What rights are you talking about?

A. The Miranda rights.

Q. Did you read these to him off a card or did you give them to him from your own memory?

A. From my own memory.

Q. And what were those rights that you gave to the defendant?

A. That he had a right to remain silent. That anything he stated could be used against him. He had a right to an attorney before answering any questions. If he could not afford an attorney, one could be provided for him. And that if he wished to answer questions, he could stop at any time and request an attorney.

Q. After you told Mr. Watson that, what, if anything, did he say to you?

A. He said, "Frank, I understand my rights."

Q. He knew you on a first name basis, then?

A. Yes, he did.

Q. What, if anything, did you do after that?

A. I asked him, "Henry, where is your car?"

He pointed to a beige Monte Carlo Chevrolet in the parking lot. And then I stated, "Can I look inside?"

And he said, "Go ahead."

I said, "You know, if I find anything, it is going

24 to go against you."

And he said, "Go ahead, there is nothing in there."

Q. In other words, he indicated it was all right to search his car?

A. Yes, he did.

Q. Did you, in fact, search his car?

A. I did.

Q. Did you search it personally?

A. Along with Inspector Higgins.

Q. What, if anything, was found in that search?

A. Under the floormat on the driver's side, I recovered envelopes and credit cards.

Q. Do you know the names of the credit card holders that were on the card?

A. May I look at the——

Q. Yes.

A. There was an envelope that was recovered under the floormat, bearing the name of Marlene Steinberg, S-t-e-i-n-b-e-r-g. 12407 Ohio Street, West L. A., California. Another one addressed to Kenneth Sorensen of 1244 North Gower, L. A., California 90046. It bears my initials, the date of 8–23–72.

I am removing two envelopes, one bearing the name of Kenneth Sorensen, 12118 Ohio, West Los Angeles, California 90025. The return address of Post Office Box Z, Pasa-

25 dena, California 91109.

Inside the envelope is a Bank of America credit card No. 4024 688 038 351, good through 08–73, bearing the name of Kenneth Sorensen.

Q. And that was found under the driver's seat, did you testify?

A. Yes, under the floormat on the driver's seat. This bears my initials with the date of 8–23.

Q. And was anything else found in the car?

A. Yes.

Q. What was that, briefly, Officer?

A. This was another envelope containing a credit card with the name of Marlene M. Steinberg, No. 4024 682 187 691, good through 08–73. This also bears my initials and the date 8–23–72.

Q. In order to gain entry to the car in question, did you need the car keys?

A. Yes.

Q. Were they given to you?

A. Yes, by Mr. Watson.

Q. Prior to the 23rd, did you know what car the defendant Watson would be driving?

A. Yes.

Q. How did you know that? How did you have that
26 information?

A. Mr. Khoury advised us of this.

Q. What information did he give you concerning that car?

A. That this was a rental vehicle, a Monte Carlo, beige in color.

Q. Did he give you a license plate?

A. Yes, if I may refresh my memory on the license number. It would be bearing license plate numbers 161 DVW, registered to Dollar-A-Day Rental Car System on Century Boulevard in Los Angeles.

Mr. KENNEY. Your Honor, could I have one moment to confer with cocounsel?

The COURT. Certainly.

[Brief pause.]

By Mr. KENNEY:

Q. Inspector Barbarick, after the occasion in question, what, if anything, did you do with the car; was the car impounded?

A. No, it was not.

Q. Did you inform the owner where the car was or other officers under your control that day?

A. There were other officers under my control at that
27 time. I don't—I believe we left the car there, because it was still rented by Mr. Watson.

Q. Returning to——

Mr. NASATIR. Object to that, Your Honor, and ask that that statement go out as hearsay; also incompetent.

Mr. KENNEY. I have no objection, Your Honor.

The COURT. All right, it will go out.

By Mr. KENNEY:

Q. Directing your attention to Mr. Khoury, you mentioned at the beginning of your testimony that you had had dealings with him on four or five occasions. What were the nature of these deals?

A. He would relate information on different people, as far as violations of mail theft and also of Mr. Watson. He stated he

talked to Mr. Watson on two or three occasions prior to the 17th.

Q. Was the substance of the information he had given you previously reliable information; did it turn out to be reliable?

Mr. NASATIR. Objection, conclusion, Your Honor.

The COURT. Overruled.

By the WITNESS:

A. Yes, because knowingly the background of Mr. Watson, it was fairly easy to check it out.

28 By Mr. KENNEY:

Q. In other words, he had given you information previously on Mr. Watson; is that correct?

A. On people that Mr. Watson was with and different names that Mr. Watson had talked about in their conversation with people that I had investigated prior to that for mail theft.

Q. On the basis of Mr. Khoury's information, you conducted investigations; is that correct?

A. Yes.

Q. And your investigations did——

Mr. NASATIR. Objection. Leading, Your Honor. This line of questioning is crucial.

The COURT. Yes.

Mr. KENNEY. Your Honor, I am trying to save time for the Court.

The COURT. Well, I know, but I think counsel is right. This is a very important part.

By Mr. KENNEY:

Q. Concerning the information that was given you by Mr. Khoury, did you check out that information?

A. Most of it, yes.

Q. Yes, and what did you find out concerning this information?

29 A. Well, it helped on information of knowing the whereabouts and people or suspects that were involved in mail theft throughout the Los Angeles area.

Q. Had Mr. Khoury ever given you false information?

Mr. NASATIR. Objection, Your Honor, conclusion.

The COURT. Overruled.

Mr. NASATIR. Then I will object to the basis of the question, Your Honor.

The COURT. Overruled.

By Mr. KENNEY:

Q. Could you repeat your answer?

A. Not that I know of.

Q. Are you familiar with Mr. Watson's reputation among law-enforcement agencies?

Mr. NASATIR. Objection, Your Honor, irrelevant.

The COURT. Sustained.

I think you can ask him now in this context, what information he may have received from other agencies concerning Mr. Watson.

Mr. KENNEY. Thank you, Your Honor.

The COURT. Excuse me, I misspoke myself. I didn't mean concerning Mr. Watson, but concerning Mr. Khoury's information or information from other agencies concerning Mr. Khoury's reliability.

30 By Mr. KENNEY:

Q. To your knowledge, Inspector Barbarick, has Mr. Khoury ever furnished information to local law-enforcement agencies?

Mr. NASATIR. Objection, Your Honor, incompetent; hearsay, also.

The COURT. Overruled.

By the WITNESS:

A. It is unknown.

By Mr. KENNEY:

Q. It is unknown to you.

Have you ever been contacted by local law-enforcement agencies—I hope I am not getting into an area that you don't want me to, Your Honor—have you ever been contacted by local law-enforcement agencies concerning Mr. Watson?

Mr. NASATIR. Same objection, Your Honor, hearsay.

The COURT. Sustained.

Mr. KENNEY. Excuse me, Your Honor.

[Brief pause.]

Your Honor, the problem I am having here, cocounsel has brought to my attention, is the fact that relying upon the Harris v. United States case, they talk about the known reputation of the individual concerned, the defendant in that case, as being an element that can go towards—at least

31 as I remember the case—probable cause or the sufficiency of the affidavit. This is what I am trying to bring out from Inspector Barbarick, the fact that to show proof here that

the defendant is widely known in law-enforcement circles as being an individual in trafficking stolen mail.

My understanding and recollection of the Harris case is, that the Court said in that case that this was a legitimate avenue of inquiry. Certainly not at the trial, but at any motion to suppress or pretrial motion.

The COURT. Well, as I understand it, the thrust of the motion is that, one, that there was no consent to search the car; and two, that the informant was not reliable. You have covered that. There is no foundation for the questions that you are now asking.

Now, the record doesn't show whether he was arrested as the result of a warrant or not.

Mr. KENNEY. You mean, in the case before us, Your Honor?

The COURT. Yes. Whether Mr. Watson was. If he was arrested because he was caught in the act with stolen mail more or less, why, then, a warrant may be unnecessary.

But if either the car was searched pursuant to a warrant or if he was arrested pursuant to a warrant, why, then, of course, what support there was for the issuance of warrant

32 would be material. But we don't have that in the record at the moment.

Mr. KENNEY. Thank you, Your Honor.

By Mr. KENNEY:

Q. Inspector Barbarick, when you arrested the defendant Watson on August 23 at the Ship's Restaurant, did you have a warrant for his arrest?

A. No, I did not.

Q. What information did you rely upon in arresting him?

A. On the card that was turned over to me by the informant.

Q. And the informant told you he got the card from where?

A. He had received it from Mr. Watson.

Q. And you had checked and found out that that card has in fact not been misdelivered or been sent and not received?

A. Yes.

Q. You recognize the individual who you arrested in the courtroom today?

A. Yes.

Q. Where is he seated here?

A. He is sitting at defense table.

Q. Would you describe him.

33 A. A brown sport jacket and brown shirt.

The COURT. All right, he has identified the defendant.

Mr. KENNEY. May the record so reflect, Your Honor?

The COURT. Yes.

Mr. KENNEY. No further questions, Your Honor, thank you.

The COURT. All right.

You may cross-examine.

CROSS-EXAMINATION

By Mr. NASATIR:

Q. Mr. Barbarick, you stated that the information you relied upon in arresting Mr. Watson was the fact that he had given the credit card to the informant; right?

A. Mr. Watson had, yes.

Q. Now, the fact that he, Mr. Watson, had given the credit card to the informant was based on what the informant told you; is that correct?

A. That is true.

Q. This informant, Mr. Khoury, had he been arrested by your service prior to August 17, 1972?

A. Not by our service, no.

Q. Had he been arrested by any law-enforcement
34 agency, to your knowledge?

A. My understanding is that he had a State violation.

Q. And that State violation was forgery, was it not, sir?

A. I believe it was.

Q. That State violation had to do with credit cards, did it not?

A. I am not sure on that, whether it was credit cards or checks.

Q. It is possible that it had to do with credit cards; is that correct?

A. I don't know.

Mr. KENNEY. Your Honor, I would object. It calls for speculation by the witness. He has already answered, and he says he doesn't know.

By Mr. NASATIR:

Q. Was it your information that the arrest of Mr. Khoury by local law-enforcement involved stolen mail?

A. I believe it did.

Q. Is that how you got involved in the case with local law-enforcement?

A. No, I didn't get involved in the case at that time.

Q. Do you know the disposition of the arrest of Mr. Khoury on the State side?

35 A. I believe—this is from what Mr. Khoury told me, of course.

Mr. KENNEY. Your Honor, I object. It seems to me it is irrelevant; plus he is asking for speculation. The witness apparently doesn't have first-hand knowledge.

The COURT. Overruled.

By the WITNESS:

A. Mr. Khoury stated that he had spent some time, a short amount of time in jail and I believe he was placed on probation for this period.

By Mr. NASATIR:

Q. Out of this case that involved stolen mail, your service did not arrest Mr. Khoury; is that right?

A. No, we didn't arrest him for that violation.

Q. Did your service have Mr. Khoury under investigation for any current violations of possession of stolen mail?

A. He was investigated for that violation, if that is what you mean, by our service.

Q. For the prior violation; is that correct?

A. Yes, on the State charges.

Q. And your service never charged him, am I right?

A. We have a policy here—the U.S. Attorney has a policy. If there are two related charges involved, State charges, it would be repetitious on our part to charge him with
36 another offense.

Q. Was Mr. Khoury being compensated by your service for the information he had given you?

A. You mean in reference to Mr. Watson's arrest?

Q. Yes.

A. Yes.

Q. What form of compensation did he receive, sir?

A. Expenses he incurred.

Q. And how much expenses did he receive prior to August 17, 1972?

A. I would have to get my books out on that. It was gas money and parking fees at that time.

Q. The informant contacted you on four or five occasions prior to August 17, 1972, in order to give you information; is that correct?

A. Yes. I forget exactly how many times it was, but he made contact with me.

Q. Can you tell me between or what monthly period these conversations took place?

Let me try and make it easier for you: When did he become an informant for your service, sir?

A. Well, my first contact with Mr. Khoury was—I am trying to think back, it was back around February or March of this year. The first actual contact that I had with him.

37 Q. Of 1972?

A. Yes.

Q. Is that when he began receiving expenses?

A. No, not at that time.

Q. Now, was that a personal contact or a telephonic contact?

A. No, it was a personal contact.

Q. Now, would it be fair to say that on the four or five occasions that Mr. Khoury gave you information, that it was related to Mr. Watson in Mr. Watson's activities?

A. Most of it was, yes.

Q. All right.

Was there any that was not?

A. Only that—the associates of Mr. Watson.

Q. So everything that Mr. Khoury told you during 1972 on those four or five occasions that he talked to you when he was giving you information, concerned Mr. Watson and Mr. Watson's associates; is that correct?

A. Yes.

Mr. NASATIR. May I have one moment, Your Honor?

The COURT. Yes.

[Brief pause.]

By Mr. NASATIR:

Q. Now, prior to August the 23rd, 1972, Mr. Watson,

38 of course, was not arrested or convicted as far as you know, was he, sir? From February 1972 to August 1972, Mr. Watson was not arrested or convicted on the basis of any information that Mr. Khoury supplied, was he, sir?

A. No.

Q. Did Mr. Khoury ever testify in court relative to any of the information that he supplied you?

A. No.

Q. Did Mr. Khoury ever testify under oath or fill out an affiadavit relative to any of the information he supplied you?

A. No.

Q. After August the 17th, 1972, was Mr. Khoury surveilled in any way concerning his meeting with Mr. Watson other than the meeting at Ship's?

A. Would you repeat that question, please.

Q. Well, have you related everything—all of the investigation up until the arrest of Mr. Watson that your agency did concerning this incident?

A. I believe I have, yes.

Q. There was no handwriting analysis made of the written information prior to—that Mr. Khoury gave you, prior to August 23rd, was there?

A. I don't understand your question now.

39 Q. You said that Mr. Khoury showed you a list of airports and airport tickets that he was supposed to carry out for Mr. Watson, allegedly. There was no handwriting analysis made of that, was there, sir?

A. Not at that time, no.

The COURT. Was there silence?

The WITNESS. We sent all of our stuff to the crime lab, Your Honor, that was involved in this case.

By Mr. NASATIR:

Q. When was that sent to the crime lab, that list?

A. It was either on the 24th or shortly thereafter, by Inspector Higgins.

Q. It was after the arrest; is that correct?

A. Yes.

Q. And prior to August the 23rd, 1972, you had an exemplar of Mr. Watson's handwriting, did you not?

A. I believe we have them on file, yes, in our office.

Q. You also had an exemplar of Mr. Watson's fingerprints, did you not?

A. Yes, I think we do, right.

Q. Now, concerning the meeting at Ship's Restaurant, Mr. Barbarick, if you know, where were Agents Roo——

A. Roos.

Q. Roos and Gillespie seated in the restaurant?

40 A. They were approximately 10 to 12 feet from the table that Mr. Watson and a young lady, he was with, also Mr. Khoury.

Q. Were they at the counter or another table?

A. At another table.

Q. How many tables away from Mr. Watson's table were they seated?

A. Well, it was sort of an aisle between them there, that was about it. One table, I guess, they could have put between there, if they wanted to.

Q. They could have put one table between them?

A. Yes, that's right, I think so.

Q. And it was crowded in there at around 11 o'clock a.m.?

A. Yes, it was crowded.

Q. What day of the week did this take place, sir?

A. I will have to refresh my memory on that.

Q. Well, it was a weekday, was it not?

A. Yes.

Q. And it was at 11 o'clock a.m. in the morning?

A. No, it was just around noontime or shortly thereafter.

Q. So it was lunch time in there; is that correct?

A. Yes.

Q. And I believe you testified that it was crowded?

A. It was crowded, yes.

41 Q. Now, you received—other than the beep on your beeper—you received no communication prior to the arrest of Mr. Watson from Mr. Gillespie or Miss Roos, did you?

A. No.

Q. None of the alleged telephone conversations between your informant, Mr. Khoury and Mr. Watson prior to the 23rd, were listened to or surveilled, were they, sir?

A. I don't quite understand the question. Would you repeat it, please?

Q. Did any of your agents listen to any of the alleged conversations between Mr. Khoury and Mr. Watson prior to the 23rd?

A. On the telephone?

Q. Yes, sir.

A. No.

Q. Any other listening to the conversations between Mr. Khoury and Mr. Watson?

A. No.

Q. Had Mr. Khoury been promised any immunity or reward in connection with his work in helping to get cases for you?

A. Only his expenses.

Q. And can you tell us any approximation—I believe I asked this, but I forgot the answer—can you tell us what approximation of his expenses he received prior to August 23rd.

42 A. Well, it is difficult without my records here, but it was for gas and parking fees; it could range from five to ten dollars at one time. It could go up as high as $20. It depends on whether he had something to eat or drink while being with Mr. Watson.

Q. Prior to August 23rd, 1972, was Mr. Khoury ever observed by your agents with Mr. Watson?

A. Prior to the 23rd?

Q. Yes, sir.

A. Only at the restaurant the same day.

Q. On the 23rd?

A. Right.

Q. Now, between August 17th and August 23rd, 1972, did you ever attempt to go to the Magistrate to get a warrant of arrest for Mr. Watson?

A. I contacted——

Mr. KENNEY: Your Honor, I object. It seems to me that is irrelevant here. I don't see how that has any bearing on the case here. He already testified he didn't have a warrant.

The COURT. Yes, sustained.

By Mr. NASATIR:

Q. You were in the Los Angeles area between August 17th and August 23rd, were you not, sir?

43 A. Yes, I was.

Q. Now, you stated that the information that Mr. Khoury supplied to you concerning Mr. Watson on the four or five occasions helped as to knowing the whereabouts of Mr. Watson?

A. Well, yes, plus other information.

Q. All right.

And that information helped you in other investigations, is that correct, or just an intelligence view?

A. It eventually resulted in the arrest after the 23rd. I will say this: That it helped bring about arrests.

Q. Prior to the 23rd, there had been no other arrest based upon this information, had there?

A. No.

Q. And certainly there had been no convictions based upon any information Mr. Khoury had supplied to you; is that correct?

A. No.

The COURT. I don't think that is very material. I mean, the fact that there had been neither arrests or convictions, unless we know what the information was concerning what person.

Mr. NASATIR. Any person, Your Honor.

The COURT. Well, I know. In other words, information
44 which is received from an informant may be concerning innocent acts of various people, whose whereabouts and activity is thought by the police or agents or inspectors to be material to an investigation.

By Mr. NASATIR:

Q. Let me ask you this then, Mr. Barbarick.

Can you tell us what the first piece of information Mr. Khoury gave you was, on the first of these five occasions?

A. Well, the first time that I met Mr. Khoury, the information that he related to me, if I may go back that far, was regarding Mr. Watson.

Q. What was that, sir?

A. Well, first of all, I asked him if he wanted to help the Postal Inspectors on mail violations and mail thefts. I asked him who did he know and he said, "I know a subject by the name of Henry Watson."

He said, "Do you know him?"

I says, "Yes."

I stated what were your connections with Mr. Watson and he said, well, Mr. Watson had given him material checks and identification to go into a bank to make a bank transaction, deposit less cash. He was arrested by the police and convicted of that crime.

Q. That was prior to this, though; is that correct?

45 A. That was my first meeting—the first contact of the information that I have related he gave me.

Q. I see, Mr. Khoury was arrested?

A. Mr. Khoury was arrested on stuff that was given to him, he claimed, by Mr. Watson.

Q. Did you do anything to check out this claim? Did you run fingerprints of the checks in the State court?

A. I didn't have the stuff, it was in the court file at the time.

Q. Did you ask for an order to release that information?

A. No, I did not.

Q. What investigation, if any, did you do to corroborate that information?

A. check it with the Postal Inspector that investigated the case.

Q. Was any arrest of Mr. Watson made concerning that information?

A. No, not at that time.

Q. What was the next piece of information that Mr. Khoury gave you—well, let me ask you:

Has Mr. Watson ever been arrested on that charge?

A. On the charge of Mr. Khoury's, not that I know of.

Q. And what was the next piece of information he supplied to you?

46 A. It is difficult to go back on the dates. He was talking about people that had associated with Mr. Watson, such as, Mr. Brown, a girl by the name of, I believe, Carr, Linda Carr; people that he had met at different places with Mr. Watson. We knew that——

Q. Well, let me ask you this, Mr. Barbarick:

Was he ever surveilled by your agents in the company of any of these people?

A. No, he wasn't.

Q. What else, sir?

A. Well, each time, up until the time he called me on the 17th, there was information about people that we had under investigation or had arrested prior to this time for mail thefts.

Q. And no surveillance or independent corroboration was made of you of that information that Mr. Khoury had given to you; is that correct?

A. Other than checking out the information.

Q. Other than checking out the fact that these might have been associates of Mr. Watson?

A. Checking the associates out, yes. We checked that out.

Q. You checked the associates?

We checked to see that they were still involved in
47 what we call, "Mail theft violations."

Q. But as far as Mr. Watson—none of the information that Mr. Khoury gave you at that time led to any arrests or convictions; is that it?

A. Not at that time, no.

Q. Now, Mr. Barbarick, directing your attention to Ship's Restaurant at the hour of 11 o'clock p.m. on August 23rd, after Mr. Watson's arrest. You testified as to what you advised Mr. Watson. Is that the sum and substance, as well as you can remember, as to what rights you advised Mr. Watson of?

A. Yes.

Q. All right.

After you advised him of his Miranda rights, as you call them, did you ask him if he was willng to make a statement to you?

A. Not at that time, no.

Q. At that time the only question—the first question you asked him was whether he understood his rights; is that correct?

A. Yes.

Q. After you asked him that question, did you say anything else to him; what next did you say?

A. Well, after he stated, "Yeah, Frank, I know my
48 rights," and I asked him where his car was at, and he pointed to it.

Q. What then did he say?

A. Then I asked him if I could look in the car and he stated, "Go ahead."

I stated, "You know, if I find anything, it is going to go against you."

And he said, "Go ahead, there is nothing in there."

Q. Is that the sum and substance of your conversation with Mr. Watson prior to searching the vehicle?

A. That was about it at that time.

Mr. NASATIR. I have no further questions, Your Honor.

The COURT. All right, sir. Anything else?

Mr. KENNEY. I have a few more questions, Your Honor.

REDIRECT EXAMINATION

By Mr. KENNEY:

Q. Could you repeat, again, Inspector Barbarick, what was the charge that you arrested Mr. Watson for on this previous occasion?

A. Possession of stolen mail.

Q. Do you know the disposition in that case?

49 A. The disposition?

Q. Yes, what was the outcome of that case?

A. This is the one with the cards we have here.

Q. I don't mean on the August 23rd——

A. I am sorry.

Q. You said you arrested him on a previous occasion.

A. Inspector Higgins and I arrested him prior to this arrest.

The COURT. For what?

The WITNESS. For possession of stolen mail, Your Honor.

By Mr. KENNEY:

Q. Do you know what the outcome of that was, the court outcome; did the charges ever go to court?

A. No, they did not.

Q. Do you know why they did not?

A. Yes.

Q. Why is that?

Mr. NASATIR. Objection, Your Honor, irrelevant.

The COURT. Overruled.

By the WITNESS:

A. Mr. Watson had furnished our service with information that resulted in the arrest of a major violator in mail
50 theft.

By Mr. KENNEY:

Q. So what happened with the charges?

A. The charges were dropped at that time.

Q. You testified on cross-examination that the service had exemplars of Mr. Watson's handwriting; is that correct?

A. I believe we do.

Q. On what occasion did the service receive those?

A. I believe at the time that Inspector Higgins and myself arrested Mr. Watson.

Q. This would be on the previous arrest?
A. Yes.
Q. What was done, if anything, with those exemplars?
A. They were placed into the packet at that time.
Q. Were they compared with any known violations, whether they be checks or credit cards?
Mr. NASATIR. Objection, Your Honor, irrelevant.
The COURT. Sustained.
Mr. NASATIR. Also hearsay, Your Honor, and incompetent.
Mr. KENNEY. Your Honor, I am trying to establish exactly what the officer's knowledge of the defendant Watson was; and I am trying to establish this by the fact that he had taken handwriting exemplars from him in the past and that perhaps had been highly incriminating.
51 Now, for one reason or another, perhaps charges were never brought. But I think this goes once again towards showing what the reputation of the defendant was, in order to establish the probable cause to arrest him on this particular occasion.
Now, obviously, that can't carry the case alone. But I feel that, combined with what I claim is the reliability of the informant, would be relevant to this court.
Mr. NASATIR. May I be heard, Your Honor?
The COURT. Yes.
Mr. NASATIR. Your Honor, it has already been established that this investigator had arrested this man in 1971 on postal violation charges, and those charges were dismissed. That fact, having been admitted, I think all other facts are irrelevant. Plus the fact that any other fact would be complete hearsay.
The COURT. Well, I don't know that they are irrelevant. I think it is more likely to be cumulative. I mean, they are already familiar with him as a violator for this type of offense, which would add to their knowledge and give them further reason to think that in all probability the information they were getting from the informant is correct; and that is the point.
Mr. KENNEY. Your Honor, I will withdraw the ques-
52 tion if you feel it is cumulative.
The COURT. All right.

Mr. KENNEY. I just have one or two more questions, if the Court please.
By Mr. KENNEY:
Q. When Mr. Khoury was giving you information concerning Mr. Watson, you testified that he gave you information concerning Mr. Watson's acquaintances and his friends; is that correct?
A. Yes.
Q. Was this information specific enough so as to clearly identify that Mr. Khoury did know Mr. Watson?
A. Yes, sir, it was.
Mr. NASATIR. Leading and suggestive, and I would ask that it go out and be stricken, Your Honor.
The COURT. Yes, the objection is sustained.
Mr. KENNEY. I will withdraw the question. I have no further questions, Your Honor.
The COURT. All right.
You may step down. Thank you very much.
Do you have another witness?
Mr. KENNEY. No, Your Honor.
The COURT. Do you have any witnesses?
Mr. NASATIR. No, Your Honor.
53 The COURT. Well, I think that there are two questions: One with respect to whether or not the defendant consented to the search of the car after the arrest; and after that, there is uncontradicted evidence that he did after receiving his Miranda rights. And as far as the information which would lend credence to Mr. Khoury's report, which would result in their arrest, seems to me to be reliable.
Mr. NASATIR. May I be heard, Your Honor?
The COURT. Yes, but if you want my thoughts, I was going to let you address me after you hear me.
Mr. NASATIR. I am sorry, Your Honor.
The COURT. It gives you more advantage, it seems to me than if I would go the other way around.
Mr. NASATIR. Yes, you are absolutely right, Your Honor. Thank you.
The COURT. It seems to me that Khoury is a person, who, according to this testimony, was known to them. There is no requirement that, in order to establish that a person is a reliable informant, that he produce evidence which results in some-

body else's conviction. The only thing that is required is that he's a person who is, at that time, at least, reporting reliably the information which the agents want.

A man may, prior to that time, have in his own defense perhaps not be truthful in some other action. But if, as the
54 information is received, it is checked out, people are where he says they are and this is material then it lends credence to it. And most particularly when they have checked out a credit card, which according to the agent, was given to him by Mr. Khoury. And by checking out, I mean, they inquired of the bank that issued the credit card, and the bank advised that the credit card had been mailed and it had not been received.

Now, that is information which I think makes a reliable informant. I will hear from you.

Mr. NASATIR. Thank you, Your Honor.

If Your Honor please, and with all due respect, I think the Court has overlooked the central reason or the central objective of reliable information; and that objective is a certain situation that the objects to be sought are on the premises right then at the time that the informant says they are. And in an arrest situation by analogy, it is that his person is the one who did the act that the informant said he did.

Now, the informant here has given information only as to who Mr. Watson associates with, which was never surveilled or no meetings between these people were ever surveilled by postal inspectors. There could have been reputation and rumor in the community about who his associates were. I could
55 indicate who Mr. Watson's associates are and call the Postal Inspectors with that information if I wanted to.

It was the informant who had been arrested for possession of stolen mail himself six months earlier. It was an informant whose information had led neither to an arrest nor a conviction. It was an informant whose information was, as far as it had been corroborated, and it had never been corroborated independently by the Postal Inspectors, but all of his prior information had never been corroborated.

Now, you also have a situation, Your Honor, where there is no emergency here. There is five days between the time that the informant brought this credit card to the agents and the time that Mr. Watson was arrested. Five days, Your Honor. The

only other fact, which these investigators relied upon in this case, in order to arrest Mr. Watson, was a meeting about which we know nothing of the contents; only that the informant, again, uncorroborated, except for what could have been a totally innocent meeting. And the fact that he knew Mr. Watson is undisputed. There is no question about it. But other than the fact that they met, they already had every piece of information they relied upon. There was nothing to prevent them in this situation from going to a Magistrate and getting a warrant.

They did not go to a Magistrate and get a warrant. So his independent judgment was not interposed in this case.

56 My point is, Your Honor, that if it had been interposed in this case, even after the meeting—the meeting I think Your Honor will agree adds nothing to what the postal inspectors had.

The COURT. I don't agree with that.

They met in the Ship's Restaurant. At that point, the stolen credit card exchanged hands or at least another credit card that, in all probability, was stolen in view of the information which they had, and was given, and then they received a signal that this transaction had taken place so they made an arrest.

Mr. NASATIR. That is not correct, Your Honor, excuse me. No credit card exchanged hands at the restaurant. All it was, was a meeting. The informant was to give a prearranged signal if he determined that Mr. Watson had the credit card. No credit cards exchanged.

The COURT. Well, all right.

Mr. NASATIR. Those credit cards were not——

The COURT. That is all right, I stand corrected on that. I agree with that.

But at least he had in his possession cards that didn't belong to him.

Mr. NASATIR. All right.

The COURT. And so they arrested him at that point.

57 Mr. NASATIR. Your Honor, my point is, first of all, what we have here under Aguilar, is clearly an unreliable informant. He is unreliable for the following reason—and it is the People's burden, Your Honor, of course, to prove his reliability. He is unreliable for the following reasons:

Number one, he is a convicted criminal, convicted of the same crime for which he's giving information. Number two, he is receiving compensation from the Postal Inspectors for supplying information. Number three, he is testifying or giving information, Your Honor, that is not corroborated in any significant way. His only information which could be the subject of casual reports or rumor in the community, which could be the subject of general knowledge concerning Mr. Watson. And these facts are, Your Honor—this is what the Postal Inspector knew that the informant provided.

These facts are: One, that Mr. Watson is a violator. Well, they knew that. Two, that Mr. Watson has certain friends. Fine, that is innocent. The fact that he has certain friends is innocent. The fact that Mr. Watson had a certain car with a certain license plate is innocent. Anyone who knows Mr. Watson could find that out and anyone who knows could have rented a car.

But you also have the added fact in this case, Your Honor, that two of the proposed meetings with Mr. Watson fell through. They did not show up, nobody showed up. The
58 informant's information in that a meeting would take place, information sufficient, Your Honor, to have agents surveilling the area on two occasions, did not happen.

Now, all you have is the informant's word that a meeting would take place. The informant's word that Mr. Watson gave him the credit card. The informant's word that Mr. Watson had other credit cards at the time. And the informant, Your Honor, from all the information, cannot be reliable. This is the kind of situation that the Supreme Court is talking about in Aguilar, Your Honor.

The Court. I don't agree with you. I don't think that that is what it shows.

As I pointed out before, the information may be of certain innocent acts, but when they are considered in light of other information that they have, it shows that the informant knows what he is talking about and that it is reliable information.

Now, that's the key to it. There is no requirement that some arrest result from the information which they gave them, and this is a surreptitious business.

Now, whether or not he did or didn't have stolen credit cards in his possession, speaking now of the defendant, is something

that he can contest before a jury. And if he wants that, today is then day of trial so we can try that out. But as far as the justification for arresting him at this time, it seems to me
59 that they had good reason.

The offense isn't the sale of a credit card. The offense is having in possession material which has been stolen from the mail.

Mr. Nasatir. Your Honor, I just wanted to add one further fact, if I might be heard.

Here we have the added factor that the police had ample opportunity to corroborate the informant, if they wanted to. He submitted a list of certain time and places, supposedly told to him by Mr. Watson. No fingerprint analysis or handwriting analysis was made of this list, although it certainly could have been done in the five days—there was no emergency—in the five days between then and now. And none of these telephone conversations were surveilled, in order to check the informant's information concerning its reliability, although that opportunity was there. It is a normal law-enforcement technique. It is done all the time in the federal courts, as I am such Your Honor knows, with one party consenting, which could have been the informant. No conversation, no corroboration of the informant whatsoever, only the words of an informant who had been arrested and convicted for the same offense six months prior to this. Absolutely no corrobation and no reliability.

Then, Your Honor, the cases I have cited in my supplemental Points and Authorities, point to the fact that the fact
60 that a man has a reputation or has been arrested prior to this for a similar offense, does not supply the corroboration that the informant needs. The fact that the informant knows some innocent information about a person, does not supply the corroboration. The informant must have been previously tested and found to have been previously reliable by reliable methods.

The fact that he said that Mr. Watson had certain associates and that checked out, but Mr. Watson was at certain places and that checked out, is totally innocent information, which I or anyone sitting in this courtroom could have provided in the same incident with only knowledge of Mr. Watson's reputation and association.

The COURT. Well, all of that may be true; other people may have had this information, too. If you, for instance, had that information knowing about it, that might be true, too. But you didn't also have the information that he had in his possession stolen credit cards or stolen material from the mail. That is the crucial difference.

There may be things that other people know or some that they don't know, but it doesn't have to be some kind of crucial information.

I don't agree with you on that, and I think the motion should be denied.

Mr. NASATIR. Your Honor, as to the consent search, it
61 is also the People's burden to prove a knowing and intelligent waiver of the constitutional rights concerning the search of his vehicle. This defendant was never even asked whether he would waive his rights and was never informed of his rights not to have that vehicle searched.

Under Ninth Circuit cases, Your Honor, which I can give you a few——

The COURT. Well, never mind the citations. I think I am pretty familiar with that.

Mr. NASATIR. I believe that the Ninth Circuit requires, Your Honor, that the defendant be at least informed of his rights not to submit to a search of his person or his property; and also, Your Honor, that it requires a clear and unequivocal waiver, neither of this he had in this case.

The COURT. I think there is. The motion is denied.

If you want to recess until 1:30, I will give it to you.

Mr. NASATIR. Your Honor, in this trial, there will also be a question concerning a defendant's supposed statement that he made a *Jackson* v. *Denno* hearing.

To save this Court's time, I think we could have that hearing now.

The COURT. Let's do it right now.

Mr. KENNEY. Your Honor, may I check the file on the
62 statement? I just got the file this morning.

The COURT. It may be you don't intend to use it, so there is no use in wasting our time.

Mr. KENNEY. No, I will call it to the Court's attention, if I don't.

The COURT. We will take a brief recess, so that you can look into this.

Mr. KENNEY. Thank you, Your Honor.

Your Honor, I realize this is highly irregular, but I thank you.

The COURT. That is all right.

[Brief recess was taken.]

The COURT. All right, gentlemen.

Mr. KENNEY. Your Honor, the Government will call as its first witness, Frank L. Barbarick, an inspector in the post office.

The COURT. All right, sir.

Frank L. Barbarick, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

The CLERK. You will recall, sir, that you have heretofore been sworn to tell the truth?

The WITNESS. Yes.

Mr. KENNEY. Your Honor, if I may address the Court.
63 Some of the matters I am going to be going through are going to be repetitive with the testimony this morning, but I will go through them in order to get that information on the record.

The COURT. Well, it is in the record and I don't think you have to do that. We will take into consideration the testimony that has already been given and just supplement it as much as necessary.

Mr. KENNEY. Okay, Your Honor.

DIRECT EXAMINATION

By Mr. KENNEY:

Q. Inspector Barbarick, you previously testified that you advised the defendant of his Miranda rights and you stated those rights for the record.

A. Yes, sir.

Q. After he was arrested and after the search of the vehicle, was he transported anywhere?

A. Yes, sir, to our office.

Q. Now, how was he transported?

A. Via vehicle. Our inspectors' unit, ready unit.

Q. Were you present in that unit?

A. Yes, I was.

Q. Did any conversation ensue between yourself and
64 the defendant?

A. Yes.

Q. Could you relate to the Court what the nature of that conversation was?

A. Well, there was what I would call small talk between Mr. Watson and myself.

Q. In substance, what was the nature of the conversation; by small talk, what do you mean?

A. Well, for example, what have you been doing, how have you been, what have you been doing; this type of thing.

Q. Was there any other conversation with the defendant?

A. Yes. A comment was made that, "Frank, you know, I would like to help you out on this if I can."

Q. Who made that comment?

A. Mr. Watson.

Q. Did this statement have any significance to you?

A. Yes, it did.

Q. What significance was that?

A. Mr. Watson has helped us in the past on cases relating to mail theft.

Q. Has he ever been arrested by you, and then has he ever helped you?

A. Yes. He has been arrested and he has helped us.

Q. Is this the significance of that statement to you?
65 A. Yes.

Q. Once he was taken to headquarters, what happened then?

A. He was taken to my office and there we had another conversation.

Q. Well, would he have been fingerprinted and photographed in the interim, in the in between period, to your knowledge?

A. I don't know if he had been fingerprinted prior to that conversation or shortly thereafter. It was about an hour and a half after he had been arrested that we had that conversation in my office.

Q. And this converstion took place in your office?

A. Yes, it did.

Q. Prior to talking with him in the office, did you say anything to him concerning his rights?

A. If he still understood that he was—you know, had a right to remain silent, that he had a constitutional right to remain silent and he said, "Yeah, he understood them."

Q. And did he indicate a willingness to speak to you?

A. Yes.

Q. Did he indicate in any way that he did not want to speak with you?

A. No.

66 Q. Did you make any promises, in order to have him speak with you?

A. The only thing I stated to Mr. Watson at that time was that anything that he stated or anything that he helped us with in the case, in the pending case, would be brought to the attention of the U.S. Attorney.

Q. And what, if anything, did he tell you?

A. He stated that he had received the credit cards from a subject by the name of John. And that John had received these credit cards from a postal employee.

Q. Did he give any description of where this John could be located?

A. Yes. It was an apartment complex at 800 North Mariposa, out in Hollywood.

He described John as a male Negro, 25 years of age, five feet ten inches, 160 pounds, black hair cut short, brown eyes.

Q. By these credit cards, what cards was the defendant referring to?

A. The cards that had been found in the vehicle.

Q. Was he also referring to the one that you had previously gotten from Mr. Khoury?

A. Yes.

Q. Did you follow up on the information which the
67 defendant gave you?

A. Yes, we did.

Q. And what resulted in that follow-up investigation?

Mr. NASATIR. Objection, irrelevant, Your Honor.

Mr. KENNEY. Your Honor, I am merely trying to show that the information was reliable and someone was arrested. And I think this would go a long way, as to showing the fact that he freely and voluntarily consented.

Mr. NASATIR. I think this has nothing to do with his free and voluntary consent or as far as his waiver of rights.

The COURT. The objection is overruled.

By the WITNESS:

A. There was an arrest made, yes.

By Mr. KENNEY:

Q. Was there a conviction in that case?

A. It is still pending. The court trial is still pending on that.

Q. Is it in the federal or State court?

A. Federal court.

Q. Getting back to the nature of your conversation with him, did you promise him anything at all, the defendant?

A. No, other than what I——

Q. Could you repeat that again for the record, please.

68 A. That anything he helped us with or stated would be related and turned over to the U.S. Attorney at a later date.

Q. And you have previously testified that when he was arrested on a previous date, some year before, a similar occurrence happened; is that correct?

A. Yes.

Q. And had any promises been made him on that occasion?

A. No, just that the U.S. Attorney would be made aware of what he helped us with and told us.

Mr. KENNEY. Okay. Fine.

No further questions. Thank you.

The COURT. You may cross-examine.

CROSS-EXAMINATION

By Mr. NASATIR:

Q. Mr. Barbarick, the defendant was arrested approximately 12 o'clock noon, did you say?

A. Shortly thereafter. It was around noon time.

Q. And after his arrest, his automobile was searched; is that correct?

A. Yes.

Q. And after his automobile was searched, you rode downtown and in the car he said something to the effect, "Frank, I would like to help you in this case"; is that right?

69 A. I believe—yes, that is just about the extent of it.

Q. You have known this defendant for about a year and a half, have you not?

A. Maybe a little longer.

Q. You have worked with him on prior occasions concerning other cases; is that correct?

A. He has helped us in prior occasions, yes.

Q. How many times have you talked to this defendant on prior occasions relative to his giving information to helping you as an informant?

A. It is hard to say. On one case alone, I believe we talked quite a few times, until the subject was arrested and convicted.

Q. He has given you information then on cases where subjects have been arrested and convicted; is that right?

A. Yes.

Q. How many convictions did you obtain on information given to you by Mr. Watson?

A. Well, prior—and then after his arrest this time, there was another arrest made from this last arrest.

Q. How many times prior to his arrest?

A. Now, to me personally, one time.

70 Q. Do you know of any other convictions obtained on the basis of Mr. Watson's——

A. I believe there were two.

Q. So three convictions in all were obtained on the basis of information that Mr. Watson has given to you or your service in the past; is that right?

A. Yes.

The COURT. Well, I am not sure—two convictions and one case pending? Three.

The WITNESS. Your Honor, no, there is a case pending on this last information he gave us.

The COURT. So there were three convictions previously——

The WITNESS. Prior to ——

The COURT [continuing]. And one pending?

The WITNESS. Right.

By Mr. NASATIR:

Q. Is that right, sir?

A. That's right.

Q. Now, where did you go immediately after searching Mr. Watson's vehicle?

A. We went to my office.
Q. Where is your office?
A. At Fifth and Grand.
Q. In downtown Los Angeles?
71 A. Yes.
Q. What time did you arrive at your office?
A. It was about an hour and a half or so after.
Q. After the arrest?
A. Yes.
Q. What was done in the meantime, what took——
A. Well, by the time we—I should say there was the arrest and then the search, and then by the time we got in the car and drove downtown—approximately an hour and a half.
Q. When you got to your office?
A. Yes.
Q. At any time that day, did you proceed to the United States Attorney's office to get a Complaint?
A. I didn't personally, no.
Q. Did others from your agency?
A. I believe Inspector Higgins did.
Q. Was Mr. Watson brought before the Magistrate on that day?
A. I will have to check my notes on that, if you don't mind.
Q. Could you?
A. Yes.
[Witness reveiwing notes.]
72 Before Magistrate Ralph Geffen.
Q. What time, sir?
A. It is unknown at what time. Inspector Higgins took him over.
Q. Inspector Higgins took him over after you took him to your office; is that right?
A. Yes.
Q. Was anything else done at your office other than talk to Mr. Watson?
A. Well, printed, and I believe he was—I don't remember whether a handwriting was taken at that time or not. I believe he was printed and mugged—or photographed.
Q. At your office?
A. In the building, yes.

Q. And he wasn't printed and mugged at the Marshal's office downstairs?
A. He could have been, again, I don't know.
Q. Is it your practice when you arrest them to take them to the Marshal's office to print them and mug?
A. No, it is our practice to do it in our office.
Q. All right.
Did you interview Mr. Watson at the time he was being fingerprinted or photographed?
Let me put it this way: You didn't have anything
73 to do with the fingerprinting or photographing, did you?
A. No, I didn't.
Q. Your purpose in taking Mr.Watson to your office was to interview him; is that correct?
A. Yes, talk to him.
Q. Isn't it a fact, sir, that prior to Mr. Watson being taken to your office, he had declined to make any statement that would incriminate him?
A. If I may refresh my memory on my notes, Your Honor?
The COURT. Yes.
[Brief pause.]
By the WITNESS:
A. According to—in refreshing my memory, the defendant declined to make any statement which would incriminate him, other than to say the source of the procurement of the credit cards stolen from the mail was a person by the name of John. And I testified that this individual——
By Mr. NASATIR:
Q. When did Mr. Watson decline to make any statement that would incriminate him?
A. At the time of his arrest, I think.
Q. Right at the time of his arrest?
A. Well, it was at the time of his arrest, subsequent
74 to his arrest.
Q. Was that at the La Cienega Ship's Restaurant?
A. I believe he commented at that time about—just a second, let me go back here. I have to go back here.
At the restaurant—no, it was at the office that he made this statement regarding John, that he didn't want to incriminate himself personally. But he would, tell us where he got the stuff from.

Q. Now, at Ship's Restaurant, could he have made that statement that he declined to make any statement?

A. I don't believe so, because at Ship's Restaurant our conversation was fairly brief, about the advisement of his rights, plus the fact of what was in his car—if he had anything in his car and giving me permission to go to the car.

Q. Isn't it a fact that at Ship's Restaurant the defendant stated to you that he did not want to incriminate himself and that he did not want to make any statements?

A. No, because the comment was made in a car that he wanted to help me.

Q. And did you tell him that any statement that he told you would help him; did you indicate that to him?

A. My statement to him was that anything he stated or helped us with, would be brought to the attention of the
75 U.S. Attorney.

Q. Was that your only statement in response to his statement?

A. Rather what we could do for him, you mean?

Q. Yes, sir.

A. That was all.

Q. And as to what would happen to him?

A. No, other than it would be brought to the attention of the U.S. Attorney.

I advised him, I said, "Henry, you know, I can't promise you anything."

And he says, "Yeah, I know. We have gone through this before."

Q. Where did this advisement take place?

A. I believe in the office when he started to tell us about John.

Q. You sat him down in your office to interview him, did you not?

A. He just sat in the office, yes.

Q. And you brought him to your office, did you not?

A. Yes.

Q. And he wasn't fingerprinted or photographed; is that right?

A. I don't recall if he was fingerprinted prior to that
76 time or after that time.

Q. At the time of the statement he was not being fingerprinted?

A. No.

Q. He was sitting in your office for the purpose of an interview?

A. Yes, he came in there because he wanted to talk to me.

Q. What was the first thing you said to him and what took place in your office; can you relate the exact conversation as well as you can?

A. I again told him, you know, about his constitutional rights. "That you don't have to tell me anything, Henry."

Q. Is that the way you told him about his constitutional rights?

A. Well, he had already been advised of his constitutional rights prior to that time. I said, "I advised you out in the street of your constitutional rights and it would be the same thing that I would advise you in the office."

He said, "I know my constitutional rights, Frank. You don't have to go through it again."

Q. You told him that anything he said would be made available to the United States Attorney, although there were no promises?

77 A. That was all. That anything he helped or stated or gave us would be made available to the U.S. Attorney.

Q. That is when he stated that he would not want to make any statement that would incriminate him?

A. Him personally, but he would help us with the people involved on how he obtained the credit cards.

Q. Was it your feeling that—strike that.

Is that the way he put it, "I don't want to make any statements that would incriminate me, but I will help you as to——"

A. How he got the cards.

Q. Did he say how he got the cards or who had the cards or who gave them to him?

A. How he came about having the cards.

Q. Are you sure he stated those words?

A. Well, he said, "How I got the cards."

Q. Did he mention Mr. Khoury at all?

A. Oh, yes.

Q. As to how he got the cards?

A. No, other than he said, "I know I should have watched out for that guy," you know.

Q. Now, after he was brought to our office and after he was interviewed, he was taken to the United States Magistrate; is that right?

78 A. By Inspector Higgins, yes.

Q. How far from your office is the United States Magistrate's office?

A. Oh, less than five miles, about three or four miles. I haven't actually clocked it.

Q. Would you say it is a five-minute drive away?

A. Depending on traffic, of course, it could be a half an hour drive away if you were in heavy traffic.

Q. And this was at what time that Mr. Watson was in your office?

A. Well, like I say, it was approximately an hour and a half or so after his arrest, which would bring it probably around to 2 o'clock or so. So after the interview, it could be—I don't exactly remember the time that he left to go to the Magistrate, but it could have been 3:30, something like that. Around—I don't know exactly what time it was he left for the Magistrate's. It was in the afternoon, I know that.

Mr. NASATIR. Your Honor, I have no further questions concerning Mr. Barbarick as to this issue.

May I ask about three questions on the motion to suppress issue, Your Honor?

The COURT. Yes.

Mr. NASATIR. Thank you very much, Your Honor.

79 By Mr. NASATIR:

Q. Mr. Barbarick, have you had a chance to go over your notes concerning the information supplied to you by your informant?

A. My report here that Mr. Higgins made out, he and I together. I related it to him and he placed it in typewritten copies.

Q. All right.

I am talking about your informant, Mr. Khoury. Do you remember when we were talking about information that he provided you on those four or five occasions?

A. Did I go over the notes this morning?

Q. Yes.

A. No. I remember the names he had given to me prior to this time.

Q. Now, I believe I asked you about the first information that Mr. Khoury gave to you concerning Mr. Watson.

A. That was back when he made contact with him, relating Mr. Watson with his connection.

Q. What did you do to check out that information?

A. I called Inspector Boyd N. Manis about Mr. Khoury. And he said, yes, he related the case as far as they were concerned and why they didn't file on it, because of it being repetitious.

Q. And the second time he gave you information, what was that information?

A. That is very difficult to—he gave names at different times and things that were happening, relating to Mr. Watson and his associates. So I couldn't say whether it was Mr. Brown one time or Miss Carr the next time or people associated with him and so on, because there were a number of names given at the time.

Mr. KENNEY. Your Honor, excuse me. I realize that you have allowed defense counsel to go into this area, but I fail to see the relevancy of this line of questioning and proceedings before the Court and it is very time consuming.

The COURT. Let's let him finish. He is going to be very short.

Mr. NASATIR. I will be two minutes and I think it is crucial.

By Mr. NASATIR:

Q. Mr. Barbarick, do you have a written record of your conversation with Mr. Khoury prior to August 17, 1972?

A. I could have some notes in my file, yes. I could have dates of when possibly—I didn't look at them, I don't remember. A lot of the notes that I have we would go over them. There could be some in there.

Q. Do you have your notes with you now?

81 A. No, I don't.

Q. Could you review those over the noon time and answer some questions from them this afternoon?

A. Yes, of course.

Q. Without referring to your notes, could you tell me what steps were taken to corroborate any information given to you prior to August 17, 1972, by Mr. Khoury, other than what you have already told us?

A. What I have told you, is knowing the people he talked about, the acquaintances, associates, knowing his background; everything that related to mail theft.

Mr. Watson had been associated with people, a number of people, and it goes into the hundreds probably that are involved with mail theft.

Mr. KENNEY. Your Honor, may I interrupt defense counsel.

It seems to me he is trying to relitigate the motion that we have gone into this morning.

The COURT. Yes, that is exactly right.

Mr. KENNEY. I don't think Inspector Barbarick has to bring in his notes this afternoon.

The COURT. No, we haven't gotten to that.

Mr. KENNEY. The question has already been decided.

Mr. NASATIR. If Your Honor please, I do admit that I had thought that my record was completely complete. I was surprised frankly by Your Honor's ruling.

I am trying to get the record complete by just reopening as to these few questions, so that the record may be complete for later purposes. And I would appreciate the opportunity to do so, Your Honor. I am being very brief. This is all I am going to ask.

The COURT. Go ahead. I haven't stopped you.

By Mr. NASATIR:

Q. Were there any steps taken by you other than your own knowledge of Mr. Watson's associates of the information given to you concerning Mr. Watson by Mr. Khoury prior to August 17th?

A. With the associates, you are talking about?

Q. Any steps——

A. Yes. There is a subject by the name of Brown, I think you are familiar with the name William Brown——

Q. Yes, sir.

A. That has been under investigation for quite some time through information received by Mr. Khoury and also Mr. Watson since his arrest, that we are attempting to arrest now for mail theft.

Q. Yes, sir.

I am talking about steps taken prior to August 23rd by your service?

A. Well, this was information on mail recovered out of different trucks and collection boxes, that we, with the information given to us by Mr. Khoury and Mr. Watson, helped us to determine that Mr. Brown is a suspect on these cases.

Q. Can you tell me what specific information, if any, given to you by Mr. Khoury was independently corroborated by you other than launching an investigation as to a certain subject?

A. Well, I would have to go back to the times when the collection boxes were broken into and trucks were broken into.

The COURT. Let me ask a question along this line:

You got information from Mr. Khoury as to these trucks or boxes. And that information checked with the information you had already as to the particular boxes and particular trucks?

The WITNESS. Yes. A few of them—that information Mr. Khoury had received from Mr. Watson brought about information that helped us determine that the suspect we were investigating was a Mr. Brown.

The COURT. But, so that the information you had independently, from what you got from Mr. Khoury, checked out with the information you received from Mr. Khoury; is that correct?

The WITNESS. Some of it, yes.

The COURT. All right.

Counsel now asks: Did you make an independent investigation as a result of information you got from Mr. Khoury to check out the facts that he had given to you?

The WITNESS. Yes. We checked with witnesses. But we also talked to the supervisors, people that observed the collection boxes and also the carriers that were involved in the theft of mail, as far as having their mail stolen.

The COURT. And did that information jibe with the information you received from Mr. Khoury?

The WITNESS. Information that a subject, Caucasian, certain height, long hair, was involved or had been seen in the area when the theft took place.

By Mr. NASATIR:

Q. But that subject was not positively identified prior to August 23rd, was he?

A. No. Mr. Watson gave further information to help us identify him.

Q. After Mr. Watson's arrest?
A. Yes.

Q. So the information that jibed with Mr. Khoury's
85 information, coming from Mr. Watson, came after Mr. Watson was arrested; is that right?

A. No, information—if I may explain.

Mr. Khoury gave us information that he claimed he received from Mr. Watson. Mr. Watson gave us information later that tied in with the information from Mr. Khoury.

Q. And the later time that you are talking about, that Mr. Watson gave you this information, happened after Mr. Watson was arrested, on August 23rd, 1972?

A. No, no, no.

The COURT. Well, now, what he says is this: That prior to the arrest of Mr. Watson, Mr. Khoury gave him certain information. And that that information jibed with knowledge that they already had, which would tend to corroborate. And in addition to that, they interviewed witnesses and talked to supervisors and so forth, which again corroborated the information which they got from Mr. Khoury.

After the arrest, then our present defendant contributed some additional information, which further corroborated it.

Mr. NASATIR. All right, that is what I wanted.

By Mr. NASATIR:

Q. What I am talking about is not what Mr. Watson gave you after the arrest. All right, do you understand that?

86 The COURT. Just ask a question. If there is any doubt we will rule on them then.

Mr. NASATIR. Excuse me.

The COURT. Go ahead.

By Mr. NASATIR:

Q. Mr. Barbarick, I am referring to—for clarification—information received from Mr. Khoury prior to August 23rd, 1972.

A. As I stated——

Q. Do you understand that?

The COURT. That is not a question. Now, ask a question. He understands that.

By Mr. NASATIR:

Q. Concerning information received by you, prior to August 23rd, 1972 on Mr. Brown, you received no information

from Mr. Watson concerning Mr. Brown between February 1972 and August 23rd, 1972, did you?

A. Yes, I did.

Q. Directly from Mr. Watson?

A. Yes.

Q. I see. Was Mr. Watson working as an informant for you during this time?

A. He wasn't working for me as an informant, no. But I had had a conversation with Mr. Watson.

Q. Now, what information was it that Mr. Watson
87 checked—how did you corroborate Mr. Khoury's information prior to August 23rd?

A. As I stated, just a normal investigation of the thefts. So witnesses or people that had been somebody in the area, that looked like the subject that we were interested in.

Q. Were there any positive identification of the subject you were interested in?

A. No, I don't think so. They couldn't make it at that time.

Q. Was there any pictures—and this is the subject that Mr. Khoury had told you was involved in the theft; is that right?

A. That he had heard was involved in the theft, that's right.

Q. All right.

And Mr. Khoury told you that he had heard that this subject was involved?

A. From Mr. Watson.

Q. Now, no positive identification was made, independently by witnesses, of Mr. Brown prior to August 23, 1972; is that right?

A. No positive identification.

Q. And Mr. Brown was not arrested for any crime
88 upon which Mr. Khoury gave you information prior to August 23rd, 1972?

A. No.

Q. Mr. Brown's fingerprints did not come up on any mail prior to August 23, 1972——

A. No.

Q. Concerning that which Mr. Khoury had indicated; is that correct?

A. No.

Q. Mr. Brown's handwriting had not come up in connection with any stolen mail, as far as Mr. Khoury had indicated to you, prior to August 23rd, 1972?

A. No.

Q. Was a warrant of arrest obtained for Mr. Brown prior to August 23 of 1972?

A. No.

Mr. NASATIR. Nothing further, Your Honor.

The COURT. All right.

REDIRECT EXAMINATION

By Mr. KENNEY:

Q. Officer, you stated you have been a police officer for 10 or 15 years; is that correct?

A. Close to 20 years.

89 Q. Closer to 20.

Just as a rough estimate, how many arrests have you made during that time? I know that is going to be very difficult, but I would imagine it would be in the hundreds; would that be correct?

Mr. NASATIR. Object on relevancy grounds, Your Honor.

Mr. KENNEY. Your Honor, I think I will be able to show the relevancy.

The COURT. All right, go ahead.

By the WITNESS:

A. I worked narcotics for approximately 13 years with informants and I made—it is in the thousands, I would say, more than the hundreds.

By Mr. KENNEY:

Q. Relying upon your experience as a police officer and the number of arrests that you have made, would you say that it is common experience when a man is arrested to try and make a deal, in order to get out of any wrong-doing that he might have done?

Mr. NASATIR. Objection, conclusion, irrelevant, remote, incompetent, Your Honor.

The COURT. Well, the evidence shows in this case that Mr. Watson did on two occasions and it is not unheard of in

90 the court. And since the Supreme Court said I don't have to rule in a vacuum, I think I recognize that that happens.

Mr. NASATIR. Well, Your Honor——

Mr. KENNEY. Your Honor, one of the reasons for my question is——

The COURT. The objection is sustained. I don't see any point in going into that.

Mr. KENNEY. All right. No further questions.

Thank you, Your Honor.

The COURT. All right.

My ruling is the same. I find, for the record, in the first motion: That the informant, Mr. Khoury, was a reliable informant. That he had, prior to the time of the arrest of Mr. Watson, communicated with the Post Office Inspectors and had given them information concerning mail thefts, which checked out with information, which they already had and that the Inspectors thereafter, and prior to the arrest of Mr. Watson, interviewed witnesses and inspectors and people who were observing the postal boxes and trucks, and found from those interviews that the information which they had received from Mr. Khoury was correct.

As a consequence of this confirmation of the information which received from Mr. Khoury, he reasonably concluded that Mr. Khoury was a reliable informant. And,

91 my ruling is the same as it was before.

Now, I don't quite get the purport of the second motion. Is it only the information that you want to suppress, I take it? The witness' statement that Mr. Watson said that he would like to help them; is that it? What is it that you are aiming at?

Mr. NASATIR. Your Honor, all statements purportedly made by Watson, post arrest.

The COURT. What is it, specifically, that you are trying to suppress? If he didn't make any statements, there is no point in my making any ruling at all. If he made any statements that are incriminating, I think you should specify exactly what they are, so I know what I am ruling on.

Mr. NASATIR. Your Honor, I would specify the statement as any statement in the car whatsoever concerning small talk or,

"I would like to help you," and especially the statement——

The COURT. That is denied, because I think that is just part of what happened on the way. It is part of the total picture.

All right.

Now, what is next?

Mr. NASATIR. And I would also move to suppress the statement made, Your Honor, Mr. Barbarick's office
92 concerning he got the credit cards from John.

The COURT. On what ground?

Mr. NASATIR. On the first ground, Your Honor, that there is no clear and unequivocal waiver of his constitutional rights in this case, either at the scene of the arrest or in the office.

Number two, Your Honor, that the evidence as to this no clear, unequivocal waiver, is that this man said, "I don't want to make any statement that would incriminate me."

At that moment, at least, the interrogation should have ceased and the conversation should have stopped and the man should have been given a lawyer. Because it is a man indicating that he really does not know what is incriminating and what is not incriminating.

The COURT. I don't think that the witness said that. You said it, but I don't think he affirmed that those words were said.

Can the reporter correct us on that or find that portion?

[Whereupon, the reporter is reviewing her notes.]

Mr. KENNEY. Your Honor, I believe Inspector Barbarick read from his report.

The COURT. She cannot do both at the same time.

Mr. KENNEY. I guess it would be inappropriate to
93 be off the record at this point.

The COURT. Yes, it would be.

[Whereupon, the reporter is reviewing her notes and subsequently reads back the record as follows:

"Q. Isn't it a fact, sir, that prior to Mr. Watson being taken to your office, he had declined to make any statement that would incriminate him?

"A. If I may refresh my memory on my notes, Your Honor?

"The COURT. Yes.

"By the WITNESS:

"A. According to—refreshing my memory, the defendant declined to make any statement which would incriminate him,

other than to say the source of his procurement of his credit cards, stolen from the mail, was a person by the name of John."]

The COURT. Well, excuse me, I think I have that accurately in my notes. And he said that he didn't make any incriminating statement before he got to the office. But at the office he said where he got the cards. That is the sum and total of it.

But this other question was by Mr. Nasatir, that I
94 think you ought to look for.

The REPORTER. What was the question, Your Honor?

The COURT. Mr. Nasatir asked the witness whether or not it wasn't true that the defendant had said he didn't want to make any—when he was arrested he said he didn't want to make any statements which would be incriminating.

Mr. KENNEY. Your Honor, may I address the Court off the record for a moment?

The COURT. No.

[Record read.]

The COURT. All right, I think that is all of it.

Mr. NASATIR. Your Honor, just for clarification, if I might be heard?

If it is the state of the record that this man did not say that he declined to make any statement that would incriminate him, I think we ought to clarify it, because I think it is obvious that he did make such a statement.

The COURT. I don't think it is obvious at all. He is right here and he can take the stand and testify under oath, if he wants to. And that certainly doesn't show that he did make it. Those words came from your mouth and not the witness'.

Mr. NASATIR. No, Your Honor, I asked him, "Isn't it a fact—" and he referred to his notes and he confirmed it.

The COURT. I don't think he confirmed it.

95 Mr. NASATIR. May I ask him a question at his seat, Your Honor?

The COURT. Sure.

CONTINUED CROSS-EXAMINATION

By Mr. NASATIR:

Q. Mr. Barbarick, isn't it a fact that the defendant declined to make any statement——

The COURT. Now, that is an entirely different question, now, you realize that, but go ahead.

Mr. NASATIR. I said it is my mistake, Your Honor, then, I didn't mean it to be.

The COURT. Go ahead.

By Mr. NASATIR:

Q. At some point after his arrest, did the defendant say to you that he did not want to make any statement that would incriminate him?

A. That is, other than the source of his procurement of the credit cards.

Q. Is the answer to my specific question about whether the defendant stated those words; is that——

A. That is an answer, a complete answer.

The COURT. All right, I think he has fairly answered it.

He said other than to tell about where he got the cards.

96 By Mr. NASATIR:

Q. Could you tell us exactly what the defendant said in that regard?

A. According to my notes, "Subsequent to his arrest, the defendant declined to make any statement that would incriminate him, other than to say the source of his procurement of credit cards from mail bags, as a person named John." Then he indicated a physical description of him.

The COURT. In effect he told him that and he said he wasn't going to tell him anything else.

Mr. NASATIR. Well, Your Honor, I think we are arguing the effect, now that that is in the record—if we are arguing the effect of that—I think what he is saying is: I am not going to make any statement that is going to incriminate me. And then he says, but I will give you some information concerning where I got the cards, thinking it wouldn't incriminate him. I think once he makes the statement that I don't want to incriminate myself, that any statement after that must be ruled that he did not give a clear and unequivocal waiver. It shows he was not waiving his rights not to make a statement.

Mr. KENNEY. Your Honor, may I be heard on that issue?

The COURT. Yes.

97 Mr. KENNEY. It seems to me, you have to take this entire questioning in the context, and that is in the context that on the prior occasion he had been arrested, he bargained his way out of it. He wanted to cooperate. He wanted to give all the information he could. In the car itself, he indicates, "Hey, Frank, I want to help you guys out on this." But when he is up in the office, and his rights are still in effect, he says, "Sure, I don't want to incriminate myself as to how, you know, I got the cards here with me today, but I got them from this guy."

Certainly, he didn't want to incriminate himself completely, but enough to state that I got them from a particular individual. He kind of bargained his way out of the situation.

I think the officer clearly testified that he would call it to our attention. That no bargain was in effect and that charges wouldn't be brought.

The COURT. Well, Mr. Watson is familiar enough with the proceedings and I think he knew exactly what he was doing and had full advice as to his rights and that he didn't put an end to the conversation and went ahead and made that statement. That is my point of view.

Now, what are we going to do? It is 20 minutes to 1:00.

98 Mr. KENNEY. Your Honor, defense counsel has indicated that there might be some stipulations; namely, he has indicated to me at the recess that he initially would be willing to stipulate to the fact that the credit cards in question, the three credit cards, were in fact mailed and that they were not received.

Is this a correct statement of your position?

Mr. NASATIR. That is correct, Your Honor.

The COURT. Well, should I call a jury, now that is the thing?

Mr. NASATIR. Well, Your Honor——

The COURT. We are going to adjourn until 2 o'clock at this time.

Mr. NASATIR. What I would like to do, with the Court's permission, is to possibly discuss some alternative course of action with the Assistant United States Attorney.

The COURT. All right, you can do that.

We will reconvene at 2 o'clock and you should be completed with all that at that time.

Mr. NASATIR. That will give us enough time.

The COURT. And I will see if we can have a jury waiting in the wings for us. I am sure we can.

Mr. NASATIR. Thank you, Your Honor.

[Court adjourned at 12:40 p.m. to reconvene at 2 o'clock p.m. of the same day.]

99–129 * * * * *

130 call Mr. Barbarick.

The COURT. Very well. We will call you later.

Mr. KENNEY. The Government would call as its first witness Mr. Frank L. Barbarick.

Frank L. Barbarick, called as a witness by and on behalf of the Government, having been sworn, was examined and testified as follows:

The CLERK. Will you state your full, true name, please.

The WITNESS. Frank L. Barbarick, B-a-r-b-a-r-i-c-k.

DIRECT EXAMINATION

By Mr. KENNEY:

Q. Mr. Barbarick, could you state your occupation, please?

A. Postal Inspector assigned to Los Angeles.

Q. How long have you been so employed?

A. Approximately two and a half years.

Q. What was your occupation before you went with the Postal Service?

Mr. NASATIR. Objection, irrelevant, Your Honor.

The COURT. Overruled.

By the WITNESS:

A. Police Officer, Detective Investigator.

131 By Mr. KENNEY:

Q. With what municipality or what city?

The COURT. Well, I think that is immaterial.

Mr. KENNEY. Okay, Your Honor.

By Mr. KENNEY:

Q. Directing your attention to the middle of August of this year, and specifically to August 17th of this year, did you have occasion to be contacted by one Mr. Khoury?

A. I did.

Q. And who initiated that conversation?

A. Well, Mr. Khoury called me.

Q. And what did Mr. Khoury tell you when he called?

A. He stated that he had information on a credit card. This information was given to him by a Henry Watson.

Q. Had you had a prior contact with Mr. Khoury?

A. Yes, I did.

Q. Concerning other matters?

A. Yes.

Q. And what was the nature of those other matters that he contacted you on?

Mr. NASATIR. Object, Your Honor.

The COURT. Sustained.

By Mr. KENNEY:

Q. Directing your attention once again to August

132 17th. Did Mr. Khoury, when he called you, give you a name or number of a credit card?

A. He did.

Q. What name or number did he give you?

A. Syed Ahmad, that is the name. The number—if I may refresh my memory here?

Q. Did he give you the number on this occasion also?

A. No, just the name at that time.

Q. All right.

And what, if anything, did you tell Mr. Khoury?

A. He stated or I told him to try to obtain the card from Mr. Watson and bring it to my office immediately thereafter.

Q. Did he bring it to your office?

A. He did.

Q. When he brought it to your office, did you obtain a number off that card?

A. I did.

Q. And what number did you so obtain?

A. This was 4024 682 059 676.

Mr. KENNEY. Your Honor, may I approach the Clerk and give him what purports to be Exhibit 1 and have it marked for identification?

The COURT. All right, 1 for identification.

133 The CLERK. It is marked, Your Honor.

[Government's Exhibit 1 was marked for identification.]

Mr. KENNEY. Could it be shown to the witness?

The COURT. Yes, sir.

[Exhibit placed before the witness.]

By Mr. KENNEY:

Q. Do you recognize Government Exhibit No. 1?

A. I do.

Q. And what is it, please?

A. It is a Bank of America card in the name of Syed T. Ahmad. No. 4024 682 059 676, good through 08–73, with my initials dated 8–17–72.

Q. Do you recognize that credit card?

A. I do.

Q. And where do you recognize it from?

A. By my initials and the number.

Q. And when did you first see this credit card?

A. On the 17th.

Q. And who gave you that credit card?

A. Mr. Khoury did.

Q. And where did he say he got that credit card from?

A. From Mr. Watson, Henry Watson.

Q. And what efforts did you take to determine whether
134 his credit card was in fact stolen?

A. Bank of America credit card——

Mr. NASATIR. Excuse me, Your Honor. Objection, hearsay.

Mr. KENNEY. Your Honor, I am not necessarily offering this for the proof of the matter stated, but merely that he made these efforts and what he did receive and how he acted upon it at a later time.

The COURT. The objection is sustained.

By Mr. KENNEY:

Q. Did you, subsequent to this, learn that in effect that credit card had been stolen?

Mr. NASATIR. Same objection, Your Honor, and ask that the prosecutor be admonished.

The COURT. Well, the objection is sustained.

By Mr. KENNEY:

Q. What, if anything, did you tell Mr. Khoury concerning this credit card or additional credit cards?

A. I advised Mr. Khoury that this card was never received by the postal customer, when mailed out by the Bank of America Credit Card Section.

Q. What did you tell him, in addition to that, if anything?

A. That if he received any more credit cards from
135 Mr. Watson, that I would like to be notified, and where the credit cards are going to be turned over to him.

Q. Did you ask him to make any efforts in this regard?

A. Yes.

Q. What efforts did you ask him to make?

A. To try to obtain more credit cards from Mr. Watson.

Q. At a later time, did Mr. Khoury recontact you?

A. Yes. I believe it was on the 21st of August. Khoury called me and stated that he contacted Mr. Watson and that Mr. Watson had some more credit cards for him.

Q. And what, if anything, did you do?

A. At this time I set up—I told him to set up a meeting with Mr. Watson on the 22nd at a motel located in the City of Los Angeles.

Q. And what motel was this?

A. This was the Ramada Inn, it is off of Century Boulevard, close to the airport.

Q. Was there a time set up for this meeting?

A. Well, in the morning, it was set up for the 22nd.

Q. And who was to be involved in this meeting?

A. Mr. Khoury, Postal Inspector Denise Roos, along with our surveillance teams.

Q. Were you out there on that particular day?

A. I was in—yes, I was heading under surveillance,
136 had them under surveillance.

Q. For the purposes of the record and for the jury, who did you have under surveillance?

A. Denise Roos, Postal Inspector, and the informant, Mr. Khoury.

Q. And who were they waiting for?

A. They were waiting for——

Mr. NASATIR. Objection, hearsay, Your Honor.

The COURT. Sustained.

By Mr. KENNEY:

Q. Was Postal Inspector Roos acting under your direction?

A. She was.

Q. And who did you tell her to wait for?

A. I told her to wait for a Mr. Watson, Henry Watson, that was due at the motel sometime on the 22nd.

Q. On the day in question, did Mr. Watson show up?
A. He did not.
Q. What efforts, if any, did you take after this date in this regard as per the credit cards?
A. Another meeting was set up for the 23rd, the following day——
Mr. NASATIR. Object to another meeting set up, Your Honor. I think the proper answer would be he was told
137 another meeting was set up.
The COURT. Yes. The objection is sustained.
Ask another question.
By Mr. KENNEY:
Q. Did you tell Mr. Khoury to arrange another meeting with the defendant?
A. For the next day.
Q. And where was that meeting to be held?
A. At the Ramada Inn.
Q. What time was that meeting to be held?
A. In the morning.
Q. And who was to be at that meeting?
A. Inspector Roos and Mr. Khoury.
Q. And where was the meeting to take place at the Ramada Inn?
A. At the cocktail lounge.
Q. What was the time of day, again?
A. It was in the a.m., around 10 o'clock, I believe, 10:00 a.m.
Q. In effect, did a meeting take place?
A. No, not at that time.
Q. What instructions, if any, did you give Mr. Khoury then?
A. That if he was contacted by Mr. Watson, to try to—you know—ascertain where he was going to meet him or if
138 was coming.
Q. At a later time, did Mr. Khoury contact you concerning being contacted?
A. Yes, he did.
Q. What did he say?
A. He stated that Mr. Watson wanted to meet with him, but not at the Ramada Inn.
Mr. NASATIR. Object to that as hearsay, Your Honor.
The COURT. Sustained.

By Mr. KENNEY:
Q. At a later time, was another meeting arranged?
A. Yes, it was.
Q. Where was that meeting to be held?
A. The Ship's Restaurant on South La Cienega Boulevard, in Los Angeles.
Q. And what date was this to be for?
A. The 23rd.
Q. At any particular time?
A. Around 12 o'clock noon or shortly thereafter.
Q. Who were to be the participants at this meeting?
A. Just Mr. Khoury.
Q. Did you have agents or officers of your service also there?
A. Yes, I did.
139 Q. Who did you have, and perhaps you could tell us briefly where they were located?
A. At the Ship's Restaurant, Inspector Roos and Inspector Gillespie were inside, sitting at a table, approximately 10 feet or less from Mr. Khoury and Mr. Watson. On the south side, Inspector Higgins, Inspector Cooper were on Olympic Boulevard, I believe, it would be west of La Cienega. Myself and Investigator Brant were situated in a vehicle, radio unit, south of Olympic on La Cienega, on the west side of the street.
Q. Would you characterize your activities as being a physical surveillance then of the Ship's Restaurant?
A. Yes. We were able to see the front and also the other inspector to see the side.
Q. Were you the officer in charge of that surveillance?
A. I was.
Q. And what orders did you give relative to the handling of that surveillance?
Mr. NASATIR. Objection, hearsay, it is irrelevant.
Mr. KENNEY. Your Honor, it is not hearsay what orders he gave.
Mr. NASATIR. Not a court statement, Your Honor, made——
The COURT. The objection is sustained.
140 Mr. KENNEY. If I am getting into the same area of questioning, I would appreciate it if the Court would call it to my attention, Your Honor. I feel this is a very important area for the Government's case.

The COURT. I think it is immaterial what orders he gave. What happened is the important thing.

By Mr. KENNEY:

Q. Pursuant to your orders, what happened at the Ship's Restaurant?

Mr. NASATIR. Objection, Your Honor, incompetent.

The COURT. Well, it assumes a fact not in evidence.

Mr. NASATIR. And also that ground, Your Honor.

The COURT. Rephrase the question.

What happened? Can you tell us what happened?

The WITNESS. We were waiting——

Mr. NASATIR. May I take the witness on voir dire, Your Honor?

The COURT. No, not at the moment. I don't see any cause for that.

Just tell us what you did and what you observed. That is all we are asking for, not anything you didn't you yourself personally observe at the time.

The WITNESS. I observed the front door of the restaurant, Ship's Restaurant. I arrested—or went to the restau-
141 rant and arrested Mr. Watson on a signal, beeper signal, that I heard over my radio.

By Mr. KENNEY:

Q. Do you know who gave that beeper signal?

Mr. NASATIR. Objection, incompetent, Your Honor.

The COURT. Overruled.

If you know.

By the WITNESS:

A. Yes, Inspector Roos activated the beeper, which we heard over our radio unit, which alerted us to the informant and the suspect.

By Mr. KENNEY:

Q. What was that signal to alert you to?

A. That Mr. Watson had in his possession stolen mail——

Mr. NASATIR. Objection, Your Honor.

The COURT. Sustained.

Mr. NASATIR. That is a conclusion of the witness and shown to be false at a prior hearing and ask that the witness be admonished not to——

The COURT. No, just a minute. Don't make statements of that kind.

Ladies and gentlemen, you will disregard Mr. Nasatir's statement at this time.

The objection that Mr. Nasatir made, however, will
142 be sustained and you will disregard both the question and answer.

By Mr. KENNEY:

Q. After you arrested Mr. Watson in this case, what, if anything, did you do then?

A. He was removed from the restaurant.

Q. By yourself?

A. Myself and Inspector Higgins.

Q. And what was the reason for that removal?

A. The place was quite crowded and we were feeling some excitement inside of the restaurant, so we felt it best to go outside.

Q. What time did this arrest take place?

A. Around noon, or shortly thereafter.

Q. And what, if anything, happened after you got the defendant outside the restaurant?

A. I advised him of his constitutional rights at that time.

Q. Specifically what rights did you advise him of?

A. That he had a right to remain silent. That anything he stated could be used against him. He had a right to an attorney. If he could not afford an attorney, one could be provided for him. That if he wished to talk with us, he could stop at any time and request an attorney.

143 Q. Did the defendant indicate to you that he wanted to talk to you?

A. Oh, yes.

Q. And how did he indicate that?

A. He said, "Frank, I know my constitutional rights."

Q. He called you by your first name?

A. Yes, he did.

Q. And what, if anything, did you say?

A. I asked him where his car was at and he pointed to the vehicle. I asked him if we could search the vehicle and he said, "Go ahead."

I told him, "You know, if we find anything in there, it could go against you."

And he said, "I know that. There is nothing in the car."

Q. How far were you from the car at this time?

A. Well, the front door—it was a drive-through and then the parking section, so it was approximately one car length at the most, maybe two.

Q. What kind of a car was it?

A. It was a Montclaire, Chevrolet, beige in color.

Q. Did you need the keys to get into the car?

A. Yes, Mr. Watson gave me the keys.

Q. Did you personally search the car?

144 A. I did.

Q. What, if anything, did you find?

A. I recovered from the—under the floormat, some part of the vehicle, driver's side, an envelope containing two credit cards.

Mr. KENNEY. Your Honor, may this be marked for identification as Government's Exhibit No. 2, and be shown to the witness, please?

The COURT. Exhibit 2 marked for identification.

[Government's Exhibit 2 was marked for identification.]

The CLERK. It is marked No. 2, Your Honor.

The COURT. All right.

[Exhibit placed before the witness.]

By Mr. KENNEY:

Q. Officer Barbarick, do you recognize Government's Exhibit No. 2?

A. I do.

Q. Where have you seen this before?

A. This was removed from the—underneath the floormat of Mr. Watson's vehicle on the 23rd of August.

Q. Was this removed by yourself?

A. Yes, it was.

Q. Would you look inside the envelope, the contents?

145 A. I am removing two envelopes from the inside of the first envelope. The first envelope is addressed to Marlene M. Steinberg, S-t-e-i-n-b-e-rg, 12407 Ohio, No. 2, West Los Angeles, California 90025. From that envelope, I am removing a Bank of America credit card, No. 4024 682 187 691, good through 8–73, in the name of Marlene M. Steinberg. My initials, the date 8–23–72.

Q. You initialed those at the time you searched the vehicle?

A. That is when I recovered the credit card, yes, sir.

The second envelope is addressed to a Kenneth Sorensen, S-o-r-e-n-s-e-n, 12118 Ohio, West Los Angeles, California 90025.

I am removing a Bank of America credit card, No. 4024 688 038 351, good through 8–73, in the name of Kenneth Sorensen, with my initials and date of 8–23–72.

Q. Was anything else found in the car in question?

A. No.

Q. After these items were found, what, if anything, did you do with the defendant?

A. He was transported to my office or the Postal Inspector's office in Los Angeles at Fifth and Grand on the second floor.

Q. And how was he transported?

146 A. Postal Inspector's radio unit.

Q. Were you in that car?

A. I was, yes.

Q. During the time that you transported the defendant, did you engage in a conversation with him?

A. Yes, we had a conversation.

Q. What, if anything, did you say?

A. Well, small talk more than anything else, How have you been, what has been happening and so on. And Mr. Watson talked to me.

Q. What statement, if any, did he make to you?

A. He said, "Frank, I want to help you out in this case."

Q. And what did you say to him in response to that?

A. Well, I told him he could help us, but anything he did help us with, the only thing I could say about it at that time, that it would be brought to the attention of the U.S. Atorney.

Q. After he was put in the car, where was he transported to?

A. To the Postal Inspector's office.

Q. And where is that located at?

A. Fifth and Grand, Los Angeles, second floor.

Q. And once Mr. Watson was brought to the Postal

147 Inspector's office, where was he taken then?

A. To my office.

Q. And where is that located in the building?

A. The second floor. It would be the northwest side of the building, I would say.

Q. And did you have a conversation with Mr. Watson, once he was in your office?

A. I did.

Q. Who initiated that conversation?

A. I initiated the conversation.

Q. What did you say?

A. I asked him about the—first of all, I again advised him of his constitutional rights. He said, "I know my constitutional rights, Frank."

And I said, "You still don't have to say anything unless you want to."

Then I asked him about the case, the credit cards—and Mr. Watson stated that he declined to make any statements which would incriminate him, other than to—the source of the cards themselves, how he had obtained the cards.

Q. Now, what cards was he talking about?

A. The credit cards that were given—well, one was given to Mr. Khoury and the two that I recovered from the vehicle.

Q. What did he say in reference to these credit cards?

148 A. That he had received them from a party by the name of John. A male Negro that lived on Mariposa, the address is 800 North Mariposa Avenue.

Q. Did he tell you how John came into these credit cards?

A. He did.

Q. What did he say?

A. He stated that John had obtained the cards from postal employees.

Q. Did he say on what date he had obtained the cards?

A. No, he didn't.

Q. Did you make any promises to the defendant in this regard?

A. No, I did not.

Q. Did you use any threats?

A. No, I did not.

Q. Did you promise him any leniency in this regard?

A. No, I did not.

Q. What, if anything, specifically, did you tell him?

A. The only thing I stated was that what he did—what he said—what assistance he gave us, would be brought to the U.S. Attorney's attention.

Q. Subsequent to the defendant's arrest, did you con-

149 duct an investigation into these credit cards?

A. Yes.

Q. And what did your investigation turn up?

Mr. NASATIR. Objection, hearsay, Your Honor, and irrelevant.

The COURT. Sustained.

Mr. KENNEY. Your Honor, if he conducted—may I address myself to that point?

If he conducted the investigation himself, I would think he would be able to testify as to the results of his investigation; would he not?

The COURT. Well, you are asking for a conclusion in a very conclusionary way. I mean, what might be the answer to that question, I don't know. But you can ask him what he did and what happened, but your question is calling for a conclusion.

Mr. KENNEY. Thank you, Your Honor.

By Mr. KENNEY.

Q. In conjunction with these credit cards, after the arrest of the defendant, what, if anything, did you do?

A. Checked the credit cards out to ascertain—how they were obtained and also when they were mailed and if the customer received the credit cards in the mail.

Q. And what was the result of this inquiry?

150 A. That they were mailed around August 14th, by the Bank of America Credit Card Section, and the customers had not received, nor given anybody permission to possess the credit cards.

Mr. KENNEY. Your Honor, I have no further questions of this witness.

The COURT. You may cross-examine.

Mr. NASATIR. For the record, I would ask that the last statement go out as hearsay.

The COURT. Well, you stipulated to the same, so I think it is exercising futility in the trial——

Mr. NASATIR. May it go out, Your Honor?

The COURT [continuing]. To try to distinguish between the niceties of the law and the stipulation.

Mr. NASATIR. I would like it to go out.

The COURT. Denied, for the reasons I have stated.

CROSS-EXAMINATION

By Mr.NASATIR:

Q. Mr. Barbarick, when Mr. Khoury first called you concerning the credit card in question in this case, the Ahmad credit card?

A. Yes.

Q. He told you that he had it; is that correct?

151 A. I beg your pardon?

Q. He told you that he had the card already or was he going to pick it up at some time?

A. No, he had information on the card at that time.

Q. All right. And he was going to pick it up at some later time; is that correct?

A. Yes.

Q. And the next day, is that when he brought the card to——

A. No, when he contacted me was on the 17th, the first time. The second time was later that evening he brought the card to me.

Q. He brought the credit card to you later that evening?

A. Yes.

Q. Now, Mr. Khoury told you that he got the card from Mr. Watson; is that right?

A. That's right.

Q. Now, other than Mr. Khoury's word as to this specific credit card, you had no other information concerning that card at that time, did you, sir, other than what Mr. Khoury had told you?

A. The first time or the second time?

Q. The first time.

A. The first time, no.

152 Q. Other than the fact, the second time, that the card had been stolen from the mail, you had no other information concerning that card other than what Mr. Khoury told you; is that correct, sir?

A. That's right.

Q. Now, after Mr. Khoury brought you this credit card, what did you do with the card physically?

A. Well, I checked the card.

Q. You checked the card.

Did you check it for fingerprints?

A. No. I checked it through the Bank of America Credit Card to determine whether the customer had received it.

Q. And the customer had not, as far as you knew; is that right?

A. That is right.

Q. And that is what we stipulated to here in this trial?

A. Right.

Q. Other than that fact, did you run the card for fingerprints?

A. I did not, no.

Q. Did you submit the card to be run for fingerprints?

A. It was turned over to Inspector Higgins, who is our credit card inspector, who handles credit cards.

Q. Now, the second time Mr. Khoury contacted you,

153 was when, sir?

A. It was the 21st of August.

Q. Of August?

A. Yes. This is after the 17th, you mean?

Q. Right.

A. Yes.

Q. Let's talk about the17th for a second.

The second time he contacted you, he brought the card and said, "I received this from Henry Watson"; is that right?

A. Yes.

Q. I think I have asked this, and if I have, I am sorry. I don't mean to be repetitious.

Other than what Mr. Khoury said and the fact that you called and found out that the card never reached its owner, you knew nothing else about that card; is that right?

A. That is all.

Q. You took Mr. Khoury's word for the fact that Mr. Watson had given it to him at that time; is that right?

A. That is right.

Q. Now, the next time you met Mr. Khoury—or talked to Mr. Khoury about this case, was the 21st; is that right?

A. That's right.

154 Q. And Mr. Khoury set up a meeting he said with Mr. Watson; is that correct?

A. Well, he stated that Mr. Watson wanted to meet him, yes.

Q. All right.

Was it your instructions to Mr. Khoury on the 17th, that he should set up a meeting with Mr. Watson?

A. Yes, it was prearranged that day, on the 22nd.

Q. You told Mr. Khoury, in other words, to try and set up a meeting with Mr. Watson and an agent of your Postal Service, who is a woman named Mrs. Roos?

A. Roos.

Q. Roos, I am sorry.

A. Yes, we had a prearranged meeting.

Q. But, what I am trying to get at, Mr. Barbarick. You told Mr. Khoury to set up the meeting; right?

A. After we received information that Mr. Watson wanted to turn over some credit cards to him.

Q. Yes, after Mr. Khoury told you that Mr. Watson wanted to turn over credit cards to him?

A. That's right.

Q. Mr. Khoury told you that Mr. Watson had more credit cards and wanted to turn them over to him, Mr. Khoury; is that right?

155 A. That's right.

Q. And you told Mr. Khoury, "We will set up a meeting with him and we will get the credit cards"; is that correct?

A. That's right.

Q. And that is the meeting that Mr. Khoury set up on August the 21st; is that correct?

A. No, the 22nd was when the meeting was set up for.

Q. The first meeting was set up?

A. The first meeting, that is right.

Q. And Mr. Khoury said that he talked to Mr. Watson and a meeting was arranged with the police woman—of course, Mr. Khoury wasn't supposed to disclose this—with a police woman and Mr. Khoury at the Ramada Inn; is that right?

A. That is right.

Q. And did he give you a specific time the meeting was set up?

A. In the morning, on the 22nd.

Q. And on reliance of Mr. Khoury's statement, you and how many officers went to the Ramada Inn?

A. Five. That is including Inspector Roos.

Q. Including Inspector Roos, who is the woman?

A. Yes.

Q. Five agents went to the Ramada Inn that morning?

A. I believe five.

156 Q. In fact no meeting took place, did it?

A. No meeting took place on the 22nd.

Q. After Mr. Khoury had told you that a meeting would take place, no meeting did take place; is that correct?

A. No meeting took place.

Q. Then you asked Mr. Khoury to contact Mr. Watson again, did you not, sir?

A. I don't know if that was the first time or second time. Mr. Watson called himself, too.

Q. Did he call you?

A. No—according to Mr. Khoury, I should say.

Q. Mr. Khoury told you that Mr. Watson called; is that right?

A. Yes, and then he talked to Mr. Watson.

Q. Where was Mr. Watson supposed to have called Mr. Khoury?

A. At the Ramada Inn.

Q. Were you there when this call was supposed to take place?

A. No.

Q. You didn't see this call come in or Mr. Khoury pick up a phone at the Ramada Inn, did you, sir?

A. No.

Q. Of course, if you didn't see the call come in, you
157 don't know for a fact of your own knowledge whether or not that call was ever received, do you, sir?

A. Other than what Mr. Khoury told me, that is correct.

Q. Other than what Mr. Khoury told you, of your own knowledge, you don't know whether that call actually came in or not?

A. And Inspector Roos stated that Mr. Khoury had called and talked to Mr. Watson—or called and talked to somebody on the phone.

Q. Did Mrs. Roos listen in on that phone call?

A. No, she was there. She didn't go to the phone.

Q. That is all she saw?

A. Yes.

Q. She didn't listen to that phone call, did she?
A. No, she didn't listen on the phone.
Q. Now, Mr. Barbarick, the second meeting that was set up at the Ramada Inn, you told Mr. Khoury to get ahold of Mr. Watson; is that right, sir?
A. To set up another meeting, yes.
Q. Did Mr. Khoury call you back?
A. I talked to him that day, yes, on the 22nd.
Q. He called you back at the Ramada Inn?
A. No, I was at the Ramada Inn.

Q. And Mr. Khoury told you and told you that another meeting was set up; is that right?

158

A. No. Mr. Khoury didn't call me. We met and talked and he told me that another meeting was set up for the 23rd, the next day.
Q. On the 23rd, the next day, at the Ramada Inn; is that right?
A. Yes.
Q. And on what reliance of what Mr. Khoury said about meeting the next morning, you and the five agents went back to the Ramada Inn; is that right?
A. Yes.
Q. And in fact, on the 23rd, no meeting took place?
A. At the Ramada Inn, no meeting took place, yes, sir.
Q. No meeting took place?
A. At the Ramada Inn.
Q. After that, Mr. Khoury was supposed to set up another meeting with Mr. Watson; is that correct?
A. Yes.
Q. Did you so instruct him?
A. I think this meeting was set up by Mr. Watson, according to Mr. Khoury.
Q. According to Mr. Khoury?
A. Yes.

Q. And he, Mr. Khoury, said that Mr. Watson set up this meeting at Ship's Restaurant; is that right?

159

A. That's right.
Q. But you didn't hear Mr. Watson set up this meeting, did you?
A. No, I did not.

Q. None of your agents heard Mr. Watson set up this meeting, did they?
A. No, they did not.
Q. Now, between the 17th and the 23rd, did your credit card come back from being analyzed for fingerprints?
A. No.
Q. Do you know whether in fact it was submitted to be analyzed for fingerprints?
A. I believe it was. I would have to check with Inspector Higgins on that.
Q. But at all times you had that credit card in your possession, did you not, between the 17th and the 23rd?
A. Myself or Inspector Higgins, yes.
Q. Your service?
A. Yes.
Q. And then we go to the meeting at Ship's Restaurant; is that right?
A. On the 23rd, right.

Q. And the beeper signal to which you referred, was to be given to you when the informant found out that Mr. Watson had the credit cards in his possession, is that right?

160

A. That's right.
Q. Did you instruct the informant, Mr. Khoury—and when I am using informant, you understand, I am talking about Mr. Khoury?
A. Yes.
Q. How do you pronounce his name?
A. Khoury.
Q. And were these the instructions that you gave to Mr. Khoury?
A. That if Mr. Watson had in his possession credit cards and identification, that he was to signal Inspector Roos or Gillespie in the restaurant; and they would alert the beeper, which in turn would alert us, the inspectors that were outside.
Q. And that beeper signal then came to you; right?
A. Yes, it did.
Q. Now, to your knowledge, no one heard what went on when Mr. Khoury and Mr. Watson were sitting at that table, did they?
A. No, other than a young lady that was with them.

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Q. There was a young lady with them, but none of the agents overheard the conversation?

161 A. No.

Q. You certainly didn't, did you?

A. No.

Q. You have radio equipment that you can affix to informants in order to overhear conversations, do you not, with the Postal Service?

A. We have access to them, yes.

Q. They are called car Transmitters, are they not, sir?

A. Well, there is a number of names for them.

Q. Do you have such a transmitter?

A. We have access to one out of Washington, D.C.

Q. Do you know what I am talking about?

Mr. KENNEY. Your Honor, I object to this line of questioning. I have let it go on, but I believe it is kind of time consuming and I think it is certainly irrelevant what type of——

The COURT. The objection is sustained.

Mr. NASITIR. Your Honor, I believe it is important to our case. I think it is perfectly relevant and the relevance will be seen in one minute.

The COURT. The objection is sustained.

By Mr. NASATIR:

Q. Was your informant, Mr. Khoury, outfitted with

162 one of these transmitters that day?

Mr. KENNEY. Your Honor, same objection.

The COURT. No, he has got a right to answer this.

By the WITNESSS

A. No.

By Mr. NASATIR:

Q. When you arrested Mr. Watson that day, your arrest then was based on what you told us so far; is that right?

A. Yes.

Q. Your arrest was based on the fact that you discovered that credit card you had was stolen and the fact of what Mr. Khoury had told you concerning Mr. Watson?

A. That is right.

Q. When you arrested Mr. Watson, did you conduct a search of Mr. Watson's person?

A. Mr. Watson was carrying a——

The COURT. Answer yes or no.

By the WITNESS:

A. Yes.

By Mr. NASATIR:

Q. Did you find any stolen credit cards on Mr. Watson's person?

A. No, we didn't.

Q. Then you searched the car; is that right, sir?

163 A. That's right.

Q. And when you found the envelopes—the envelope that you told the jury about today, where did you find it?

A. It was under the floormat on the driver's side.

Q. How long did you search prior to finding that envelope?

A. A short time.

Q. Could you estimate for us?

A. Less than 15 minutes, I guess, within 15 minutes.

Q. Could it have been as long as 15 minutes?

A. I think it was less than 15 minutes. It was a very short time, I know that.

Q. When you found the cards, were they all within the envelope?

A. Yes.

Q. Just as the prosecutor handed them to you today?

A. Yes, they were.

Q. And the fact that the envelope was under the floormat, was not visible to you, was it?

A. No, it was not.

Q. Where did you first look in the car? Did you look in the glove compartment, first?

Mr. KENNEY. Your Honor, I think this line of questioning is irrelevant.

164 The COURT. I think so, too.

Mr. NASATIR. Your Honor, the charge is possession with knowledge in this case.

The COURT. But I am not going to debate that with you, and I sustain the objection.

By Mr. NASATIR:

Q. Were the credit cards visible to you under the floormat?

A. No.

Q. You couldn't tell if the credit card—you had to look, pick up the floormat and that is when you found out that there was something underneath the floormat; is that right?

A. That's right.

Q. You couldn't tell by looking at the floormat just from the outside, that there was something underneath it, could you?

The COURT. This has been asked and answered.

Mr. NASATIR. Excuse me, Your Honor?

The COURT. He couldn't see the envelope or the cards, he has already said that.

By Mr. NASATIR:

Q. Now, after you found these credit cards—may I have the exhibit shown to the witness, by the way?

165 The COURT. Yes, sir.

Mr. NASATIR. They are already before him, thank you.

By Mr. NASATIR:

Q. Mr. Barbarick, there seems to be some purple matter on the outside of those envelopes and on the edges of some of the matter contained in those envelopes. Was that on the envelope when you found it?

A. No.

Q. What is that, sir?

A. This is an anhydrite process that is conducted by our laboratory.

Q. And that is to do what, sir?

A. To determine fingerprints.

Q. To your knowledge, were Mr. Watson's fingerprints submitted to your laboratory along with that envelope?

A. As I stated, Inspector Higgins—I turned this stuff over to him. I am sure this is the normal policy to submit this information or the evidence to the crime laboratory.

Q. Right.

And a set of Mr. Watson's fingerprints would have been submitted to your crime lab also; is that right?

A. Yes.

166 Q. To your knowledge, were a set of Mr. Khoury's fingerprints submitted to your crime lab?

The COURT. At what time?

Mr. NASATIR. At any time, Your Honor. To be compared——

The COURT. Do you mean prior to the arrest or do you mean after the arrest?

Mr. NASATIR. Either prior to or after the arrest.

The COURT. All right.

By Mr. NASATIR.

Q. Let me ask it this way, Your Honor. That is complex.

The COURT. No, that is all right. You understand the question?

The WITNESS. Yes, Your Honor, I do.

The COURT. In other words, tell us when you submitted these to the laboratory and when you got back any information. Don't say what you got back, but if any information came back.

The WITNESS. As I stated before, Your Honor, Inspector Higgins submitted these to the crime laboratory, I didn't.

By Mr. NASATIR.

Q. Do you know whether or not a set of Mr. Khoury's fingerprints were submitted to your crime laboratory?

167 A. I don't know whether they were or not.

Q. A set of Mr. Khoury's fingerprints is available to you, is it not, to your knowledge?

Mr. KENNY. Your Honor, once again this seems irrelevant to me to the matter at hand.

The COURT. Sustained.

Mr. NASATIR. Your Honor, I will be glad to call Mr. Barbarick in my case, if I have to. I am trying to save time by asking these questions now.

The COURT. All right.

I sustained the objection.

It is not a matter of who called the witness. I just sustained the objection on the fact that it is immaterial.

Mr. NASATIR. May I ask to to approach the bench, Your Honor?

The COURT. No, sir. We are going to adjourn at 4:30 and I think your examination can continue.

By Mr. NASITIR.

Q. Mr. Barbarick, during one of Mr. Khoury's calls to you during this period, from August 17th to August 23rd, you stated that Mr. Watson would be driving a car, did you not?

A. Yes.

Q. Or was driving a car?

168 A. Yes.

Q. Did he say that Mr. Watson was driving a car?

A. Yes.

Mr. KENNEY. Your Honor, this is outside the scope of direct. I don't think counsel is allowed to go into this.

The COURT. Overruled.

By Mr. NASATIR:

Q. Did he describe the car to you?

A. It was a Chevrolet Montclaire, beige in color, a rental vehicle.

Q. Is that how Mr. Khoury described it to you?

A. No, he said that is what it is. He told me it was a Montclaire, beige in color, Chevrolet.

Q. Did he give you any other information about the car?

A. The license number of the car.

Q. You knew the license number of the vehicle?

A. Yes.

Q. And this was prior to the arrest on August 23rd; is that right?

A. Yes.

Q. Now, when you went down in the car to the police station, you say that Mr. Watson advised you or addressed you as Frank; is that correct?

169 A. Yes.

Q. That is your first name, is that correct?

A. Yes.

Q. You know Mr. Watson from a long time back, do you not?

A. Yes, I do.

Q. Mr. Watson has been an informant for you, has he not?

A. Yes, he has.

Q. In fact, Mr. Watson has been an informant for you for the past year and a half; is that correct?

A. Yes, he has given us information, yes.

Q. Approximately how many occasions have you talked to Mr. Watson in the past year and a half, would you say?

A. Four, five, maybe more. He used to call off and on up until just recently.

Q. And in fact, Mr. Watson's information has resulted in some convictions for your service, has it not?

A. It has.

Q. And you worked very closely with Mr. Watson, when he gave this information to your service concerning those convictions, did you not?

A. By "closely," I don't understand that question.

Q. Well, you met with Mr. Watson on a number of occasions, didn't you?

170 A. We talked on the phone, I believe, more than we met.

Q. And you talked on the phone a lot more than five times during the past year and a half?

A. Right—it is hard, you know—we talked on the phone a number of times, I will put it that way.

Q. Would it be as many as 50 times?

A. No, no.

Q. As many as 25 times?

A. I wouldn't know, Counselor. I say we talked a number of times on the phone. It is hard to say—it is like five, maybe 10 times. It is hard to say.

Q. When Mr. Watson gave you information in those—during the period he was acting as an informant for you and in the cases wherein convictions were obtained—you considered him a reliable informant, did you not?

A. Yes.

Q. You considered him a good and helpful informant; is that correct?

A. At that time, yes.

Q. Now, when you were traveling to your office from Ship's Restaurant in Los Angeles, were you making any notes of your conversations?

A. No, we were just talking.

171 Q. Do you have any written record of that conversation?

A. Not in the car, no, sir.

Q. How many arrests have you made since August 23rd, Mr. Barbarick?

A. A number of arrests.

Q. How many would you say?

The COURT. I think that is immaterial.

By Mr. NASATIR:

Q. Well, in all of those arrests, did you ride to the station with the suspect?

A. No, not all the time.

Q. Would you say in half the time?

Mr. KENNEY. It would seem to me it is still immaterial to the case at hand, Your Honor.

The COURT. Sustained.

Mr. NASATIR. Testing credibility and memory, Your Honor.

The COURT. These are about matters which are purely collateral with this and I don't think that they test memory or credibility.

By Mr. NASATIR:

Q. Let me try to get at it another way, Mr. Barbarick.

You testified as to what Mr. Watson told you in the car, purely from your memory; is that correct?

172 A. Yes.

Q. You have investigated since—two months, I guess it is almost two months to the day—you investigated many, many matters, many other matters, have you not?

A. I have investigated a number of cases, yes.

Q. And you have talked with many, many other defendants, have you not?

A. Yes.

Q. Do you remember verbatim what each of those defendants told you, without taking notes and without making a written record?

A. If I knew them as well as I know Mr. Watson, yes, I would remember, because it is something that—I remember people that I have known for quite some time. I remember what they say.

Q. And you remember verbatim what Mr. Watson told you in the car?

A. Well, as I stated, small talk in the car.

Q. Now, small talk in the car, you wouldn't remember necessarily each and every word that Mr. Watson told you?

A. No, because a number of things were stated.

Q. All right.

And you really couldn't tell us——

Mr. KENNEY. Your Honor, he seems to be arguing

173 with the witness.

The COURT. Overruled.

By Mr. NASATIR:

Q. You really couldn't tell us the rest of the small talk in the car other than the statement you gave to the prosecutor concerning what Mr. Watson said about helping you; is that right?

A. Well, he related cases and stuff, about the people that he helped——

Q. Can you remember word for word what he said; is what I am trying to get at?

A. No, not word for word, no.

Q. Is it possible, Mr. Barbarick, that Mr. Watson, instead of saying, "I would like to help you in this case, Frank," said, "I would like to help myself, Frank"?

A. No. He stated he would like to help me.

Q. There is no possibility that the word "myself" could be in your mind replaced with the word "you"?

A. No, because he stated, "I would like to help you in this case."

Q. But no written record was made of that statement?

A. No, it wasn't.

Q. That is not contained in the written report that you have here on file; is that correct?

174 A. No.

Q. And that is not contained in any notes that you took?

A. No.

Q. It's not written down anywhere?

A. No.

Q. When you got to your office, did you talk about other things other than the fact as to where the credit cards were obtained?

A. We could have had conversation of other things, that he was going to help us with; another case, other people that were involved, yes.

Q. You could have had conversations about other cases that Mr. Watson was going to help you with; is that right, sir?

A. Yes.

Q. And Mr. Watson was going to act as an informant in that cast; is that correct?

A. Yes.

Q. Now, when Mr. Watson was in your office and supposedly made the statement concerning where he got the credit cards, did you make any notes of that conversation?

A. If I may explain this, Your Honor?

The COURT. No, just answer the question.

By the WITNESS:

A. No.

By Mr. NASATIR:

Q. There were no notes made; is that right, sir?

A. No.

Q. And there was no verbatim transcript—there wesn't a court reporter taking down every word Mr. Watson said, like there is here today, sir, was there?

A. No. You mean notes—there were names written out, that part of it.

Q. Right, names written out. But not any notes as to the words that Mr. Watson was speaking; is that right, sir?

A. That's right.

Q. And was Mr. Watson asked to sign a statement concerning what he told you?

A. No.

Q. Was he asked to write out the statement in his own words?

A. No.

Q. Do you have a tape recorder in your office?

A. No, I do not. I have a dictaphone, but no tape recorder.

Q. You do have a dictaphone?

A. Yes, I do.

Q. That is what I meant.

Was Mr. Watson asked to tell his statement into the dictaphone?

A. No, he wasn't.

Q. Now, without taking notes and without having a court reporter there and, of course, a court reporter wasn't there with you in the car either, was there?

A. No.

Q. And without having a verbatim record of Mr. Watson's statement, and having worked on many cases since that time, could you state exactly the words that Mr. Watson told you in that office; is that what you are telling us, sir?

A. I could come very close to the statements that were made in the office.

Q. But that is in your opinion; is that right?

A. In my opinion, yes.

Q. Now, getting back to Ship's Restaurant, just for a moment, Mr. Barbarick.

When you asked Mr. Watson for permission to search his car, he said in substance or effect words "Go ahead," there is nothing in there?

A. Yes, he said he didn't have anything in there.

Q. He said there was nothing incriminating in his car, so why don't you go ahead and search it?

A. Yes.

Q. And he gave you permission to search it?

A. Yes.

Q. And he gave you the keys?

The COURT. Did he use the word "incriminating"?

The WITNESS. No, not at that time, Your Honor.

By Mr. NASATIR:

Q. He didn't use the word "incriminating"?

A. No, he didn't.

Q. What did he say?

A. He just said—I asked him, I said, "Is there anything in the car?"

And he said, "No, Frank, there is nothing in there."

And I said, "You know, if there is, it is going to go against you."

And he said, "I know that."

Q. When Mr. Watson was in your office at the Postal Inspector's office, did he use the word "incriminate"?

A. Only when he was again advised of his constitutional rights in a statement that he made to me.

Q. What did he say, sir?

A. Well, in substance, let's see:

"The defendant declined to make any statements which would incriminate him, other than to say the source of his procurement of the credit cards, stolen from the mail, was a person by the name of John."

Q. Did he use the word "incriminate"?

A. Yes, I think he did.

Q. Did he use the word "procurement"?

A. I believe he did.

Q. Are you sure about that?

A. Yes, I believe he did.

Q. Are you sure?

A. Yes, I believe he did.

Q. Well, what I am trying to say is: Are you sure he used the word "procurement"?

A. The word—I probably wouldn't have typed it out that way, unless he used it. So he used that word.

Q. So it is your testimony that he definitely used the word "procurement"?

A. As far as I can remember, he used that word, yes.

Q. Is it possible, Mr. Barbarick, that without notes, without a written record, without a transcription, without a court reporter, that your memory could be faulty in that regard?

A. Not really——

Q. Is it possible, that is my question?

Mr. KENNEY. Your Honor, he is arguing with the witness.

The COURT. Yes, you are arguing, now.

179 The objection is sustained.

Mr. NASATIR. May I have one moment, Your Honor?

The COURT. Yes.

[Brief pause.]

By Mr. NASATIR:

Q. Mr. Barbarick, when did you open the envelope that you found underneath the floorboard in the car?

A. I believe it was at the office.

Q. You opened it at your office in the Postal——

A. I believe it was at the office.

Q. Was the envelope sealed or was it not sealed?

A. It was sealed.

Q. It was sealed?

A. Yes.

Q. So you took a letter opener and opened the envelope with the credit card——

A. It was open, yes.

Q. At your office; is that correct?

A. Yes.

Q. You didn't open the letter with those credit cards at the scene, did you?

A. No, I don't believe so. It was at the office.

Q. And at the scene—I mean by "at the scene," Ship's

180 Restaurant on La Cienega?

A. Right.

Q. And the envelope was taken with you and Mr. Watson down to your office and opened at the office?

A. That is right.

Mr. NASATIR. No further questions.

The COURT. All right.

Ladies and gentlemen, we are going to adjourn for the evening. It is my duty to admonish you that it is your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this case on trial. And not to form or express any opinion on the case until after it has been finally submitted to you for your verdict.

Now, this is simply telling you that you should not arrive at any kind of a judgment in your own mind, until you have heard the whole case.

You should not discuss it with other people or even among yourselves, until you have heard all the evidence, you have heard all the arguments of counsel, which arguments will help orient the testimony, so that you get a complete story in the version of the respective sides; and until after you have heard the instructions of the Court.

Now, if you were on trial, charged with a serious of-

181 fense, you would want your jury to keep an open mind and to follow these instructions.

So let's give to the defendant in this case, the same kind of treatment that you would expect someone to give you if you were charged with this offense.

So now, gentlemen, may it be stipulated that the jury has been properly admonished and need not again be admonished at any time when they separate and leave the courtroom for a recess or otherwise, unless the Court is again asked to admonish the jury?

Mr. KENNEY. So stipulated, Your Honor.

Mr. NASATIR. So stipulated, Your Honor.

The COURT. May it also be stipulated that when we resume the trial before the jury, that all the jurors are present and in the box, unless the contrary is called to the attention of the Court?

Mr. KENNEY. So stipulated, Your Honor.

Mr. NASATIR. So stipulated, Your Honor.

The COURT. And one more, gentlemen: May it also be stipulated that at any time we proceed in this case in open court, that the defendant is present with his counsel unless the contrary is called to the attention of the Court?

Mr. NASATIR. So stipulated, Your Honor.

Mr. KENNEY. So stipulated, Your Honor.

Supreme Court of the United States

No. 74–538

UNITED STATES, PETITIONER

v.

HENRY OGLE WATSON

Order Allowing Certiorari. Filed February 18, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1975

No. 74-538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

UNITED STATES OF AMERICA,

Petitioner,

vs.

HENRY OGLE WATSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-538

UNITED STATES OF AMERICA,

Petitioner,

vs.

HENRY OGLE WATSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

Respondent HENRY OGLE WATSON, hereby and herewith asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53, paragaraph 1 of the Rules of this Court, and thus to dispense with the requirement of printed briefs in the instant matter.

Respondent also requests that the Court enter an order appointing MICHAEL D. NASATIR, Esq., 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211, as counsel for Respondent, in order that the Clerk, pursuant to Rule 53(7) will be permitted to reimburse said counsel for his services rendered herein and for transportation expenses in connection with the argument of this case.

DATED: January 23, 1975

Henry Ogle Watson
HENRY OGLE WATSON, Respondent

AFFIDAVIT OF HENRY OGLE WATSON

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, HENRY OGLE WATSON, being first duly sworn, depose and say:

1. I am the respondent in the within matter. The accompanying opposition to Petition for Writ of Certiorari and this Motion for Leave to Proceed in Forma Pauperis and for Appointment of Counsel was prepared by MICHAEL D. NASATIR, Esq., 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211. Mr. Nasatir represented me in all pretrial and trial proceedings before the United States District Court for the Central District of California. Mr. Nasatir further represented me on my appeal to the United States Court of Appeals for the Ninth Circuit.

2. On or about March 27, 1973, the United States Court of Appeals for the Ninth Circuit entered its order permitting my appeal therein in forma pauperis, and appointing MICHAEL D. NASATIR to represent me in that appeal. A copy of the order of the Court is attached hereto, marked Exhibit "A", and incorporated herein by this reference.

3. Thereafter, on or about December 27, 1974, this Court requested that a response be filed to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. I am presently unable to pay the fees and costs in printing the opposition hereinabove requested, or with regard to other matters which may arise in the proceedings. I am also unable to pay for the services of an attorney in the event that certiorari is granted and briefs are to be filed before this Court. Therefore, I believe that I am entitled to the appointment of counsel, and to be permitted to proceed in forma pauperis with regard to the instant document and any future documents as they may become necessary.

4. In the event that my Motion to Proceed in Forma Pauperis is granted, I hereby request that the Court enter an order appointing as my counsel, MICHAEL D. NASATIR, Esq., who has informed me that, if so appointed, he will serve as my counsel in this Court.

DATED: January 24, 1975

Henry Ogle Watson
HENRY OGLE WATSON

Subscribed and sworn to before
me on January 24, 1975

Harriet S. King
Notary Public

No. 74-538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

UNITED STATES OF AMERICA,

Petitioner,

vs.

HENRY OGLE WATSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM IN OPPOSITION FOR HENRY OGLE WATSON

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM IN OPPOSITION FOR HENRY OGLE WATSON

Opinion Below

The opinion of the Court of Appeals is reported as United States v. Watson, 504 F.2d 849 (1974).

Statement

A hearing was held in the United States District Court for the Central District of California on the respondent's motion to suppress evidence and motion to determine the voluntariness of the respondent's statements. The evidence produced by the Government indicated that FRANK BARBARICK, a United States Postal Inspector, had contact with AWAD KHOURY, four or five times in 1972, regarding alleged mail fraud cases concerning Mr. WATSON. RT 37.[1/] KHOURY never testified in Court with regard to any of the information he gave to the inspector, nor had the information led to any arrests prior to the arrest of respondent on August 23, 1972, nor to any convictions. No corroboration was obtained with regard to KHOURY's information regarding WATSON, and no arrest of the

[1/] RT refers to Reporter's Transcript of proceedings.

respondent was made as a result of these early meetings. On August 17, 1972, KHOURY told BARBARICK that he (KHOURY) was about to obtain a credit card from HENRY WATSON later that day. RT 11-13. BARBARICK obtained the credit card and KHOURY indicated he could obtain more cards from respondent. At the agent's insistence, KHOURY arranged a meeting, which was postponed several times, but which eventually transpired on August 23, 1972. BARBARICK had arranged with KHOURY for a signal to indicate if WATSON was in possession of any stolen mail. The signal was given. BARBARICK then entered the restaurant in which KHOURY and respondent were meeting, and placed respondent under arrest.

WATSON was placed under arrest for the card obtained by BARBARICK on August 17, 1972, and not based upon the signal received by the surveilling agent on August 23, 1972. RT 32.

Respondent was then removed from the restaurant and given his Miranda warnings. BARBARICK asked if he could search respondent's car, to which respondent allegedly responded "go ahead." RT 23. BARBARICK conducted a search of the automobile and discovered an envelope on the driver's side under a floormat. The envelope was not opened until BARBARICK returned to his office in downtown Los Angeles. RT 179. Two envelopes were contained inside the outside envelope, and it was these two envelopes which contained the credit cards which were the source of the allegations in Counts 1 and 3,

Respondent's motion to suppress the stolen credit cards was denied by the District Court, and respondent was subsequently convicted of possessing the two credit cards seized from the automobile. He was acquitted on a third count charging him with possession of the card provided by KHOURY on August 17, 1972.

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The United States Court of Appeals for the Ninth Circuit reversed and determined that the failure to obtain an arrest warrant under the facts of the present case vitiated the arrest. The Court further determined that the consent to search the automobile was involuntary and that the "fruits of the search should have been suppressed." 504 F.2d 849, 853.

Introductory Statement

The first question allegedly presented in the Petition for Writ of Certiorari is "whether an arrest warrant is required in order to make an arrest in a public place." The question as posed by petitioner is incorrect and irrelevant. The facts of the case indicate clearly that the arresting agents had probable cause to arrest the respondent for the offense on which he was ultimately arrested, six days prior to the arrest, but at no time attempted to obtain prior judicial approval for the arrest. The precise issue discussed and resolved by the Court of Appeals was whether the arrest was vitiated through the failure of the agents to obtain a warrant.

The decision of the Court of Appeals does not stand for the proposition, as petitioner asserts, that an arrest without a warrant is per se unconstitutional. The decision merely places the issue of arrest, i.e., the "seizure" of a person in proper historical and legal perspective under traditional Fourth Amendment privacy notions. As such, it is completely compatible with prior decisions of this Court. Petitioner's arguments with regard to the legality of the arrest completely overlook the crucial fact that the arresting agent testified that respondent was arrested based upon the information obtained six days prior to the arrest and not upon any information obtained thereafter or on the date of the arrest. The arguments presented by petitioner, when

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viewed in this factual background, are insubstantial and the constitutional dilemma alleged is illusory.

Statement

1. The Fourth Amendment to the United States Constitution contains specific provisions protecting the privacy of the "person" as well as houses, papers, or effects. That Amendment states in part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons . . . to be seized."

This Court has long recognized that the privacy of the person is at least as sacrosanct as the privacy of a dwelling or a person's papers and effects, and is thus accorded at least as much constitutional protection. Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245 (1958). This notion has perhaps been most clearly expressed in this Court's pronunciation in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) that the Fourth Amendment protects "persons not places." Rationally, protections offered with regard to a person's home or personal effects mean little if the person himself is not equally shielded. The most obtrusive interference with a citizen's privacy occurs through the detention or seizure of the person.

Moreover, this Court has consistently recognized that the protection afforded by a prior judicial approval of a search, seizure, or arrest is to be preferred over the determination of investigative agencies involved in the "often competitive enterprise in ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369

(1948). The exigencies of law enforcement which require on the spot determination under certain circumstances give way to the preference for a detached determination of a magistrate when available. The Court has also evidenced deference and concern for the possible abrogation of the rights of citizens based upon probable cause determinations by law enforcement agencies. See for example, Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). The history of growth of constitutional developments in this area demonstrates the necessity to protect against even the slightest of abuses which can occur through permitting law enforcement agencies to make their own determination of this basic constitutional concept. Henry v. United States, 361 U.S. 98, 100, 80 S.Ct. 168, 170 (1959). See also Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949).

Once it is realized that the rationale for preferring a warrant in a search and seizure situation is equally applicable to the seizure of the person through arrest, the specific insistence upon prior judicial approval becomes particularly relevant under the facts of the present case. The pronouncements of this Court in Coolidge v. New Hampshire, 403 U.S. 443, 87 S.Ct. 1642 (1971), exemplify the scrutiny which must be applied to a failure to obtain a warrant, absent exigent circumstances, and when sufficient time existed to do so with no substantial interference with the law enforcement function. The unambiguous language of Coolidge, relied upon by the Court of Appeals notes that:

> "The case of Warden v. Hayden . . . where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stand by negative implication for the proposition that an

arrest warrant is required in the absence of exigent circumstances." 403 U.S. 479-481, 91 S.Ct. 2045.

The Court concluded that "the determining factors are advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant." 403 U.S. at 482, 91 S.Ct. at 2046. This pronouncement is neither problematical nor novel. The necessity for prior judicial approval with regard to detention was recognized in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969). The impropriety of relying merely upon "inconvenience" of obtaining a warrant was underscored in Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948). The First Circuit in Niro v. United States, 388 F.2d 535, 538 (1968), relied upon the fact that "although (the officers) had long had sufficient knowledge and opportunity to seek warrants for arrest and seizure, the officers had sought none." (Emphasis added.) And finally, as stated above, the historical and legal precedent of the Fourth Amendment indicates an insistence upon a magistrate's determination absent exigent circumstances.

Similarly, petitioner's concern for the effectiveness of law enforcement as expressed in the Petition for Writ of Certiorari at page 9 is illusory. It is there stated that police will be required to ascertain at their peril the moment that probable cause attaches. This decision, however, is no different from the decision which must be made with regard to seizure of tangible items of evidence from a dwelling, nor is it substantively different from the probable cause determination which the officers must make "at their peril" in arresting persons upon probable cause. Similarly, this Court has found no difficulty in imposing such a burden with regard

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to searches of automobiles under Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, or Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975. In contrast, the decision of the Court of Appeals will insure that arrests are made while evidence is fresh and, to the extent that officers feel that the suspect will be involved in future criminality, prevents the commission of other crimes against the community by effectuating an arrest of that suspect. Moreover, contrary to the assertion of petitioner that the conduct of the agents in this case in no way could be utilized as a subterfuge for an eventual illegal search, it appears thatthe factual circumstances of this case directly parallel the concern which this Court discussed in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2035 (1969). The pre-Chimel, search incident to arrest rule, enshrined in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950), presumably permitted officers, armed with probable cause, to arrest a suspect and utilize that arrest as a subterfuge to authorize a wholesale search of the suspect's dwelling. In this case, it is clear that the agents, armed with probable cause to arrest the respondent, waited over a period of several days until they felt the respondent might be in a position in which they could, through one means or another, initiate a search of the respondent's person and automobile in order to discover additional items of evidence or contraband. Again, the possibility for abuse is highlighted not only by the fact that the agents arrested the respondent based only upon the information which they had possessed for six days and not upon the information they obtained on the day of the arrest; but that the agent did not even bother to verify his opinion of the nature of the contents of the discovered envelope until returning to his office hours later. The prophylactic measures announced in Chimel are equally applicable to the arrest situation and the decision of the Court of Appeals below is consistent with these

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principles. Finally, petitioner's concern that law enforcement officials may be placed on the horns of a dilemman for acting either too soon or too early overlooks the Court of Appeals determination that a warrant must be obtained absent exigent circumstances. If a delay in arrest is authorized, that determination must ultimately be made judicially. In the present case, no such exigent circumstances were adduced.

It should be noted that an alternative ground, authorizing suppression of the evidence, presented to the Court of Appeals, but not discussed in the Opinion, is that the seizure of the envelope with its unknown contents was itself impermissible and could not be justified under any recognized constitutional doctrine. The validity of a "plain view seizure" requires that it be "immediately apparent to the police, that they have evidence before them." Coolidge v. New Hampshire, supra. The later search of the envelope also violates the precepts of Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

2. The second aspect of the decision of the Court of Appeals which petitioner asks this Court to consider deals with the determination of that Court that the "consent" to search the respondent's automobile was invalid. Petitioner attempts to limit the determination of the Court of Appeals to the conclusion that the consent was "involuntary" and thus excluded the contention that the consent was tainted by the illegality of the arrest as the "fruit of the poisonous tree." Respondent contends that the determination by the Court of Appeals below is susceptible of supporting both these contentions. First, the "fruit of the poisonous tree" issue was raised by respondent below. Secondly, the Court states in its conclusion at 504 F.2d 853:

> "Not only was appellant WATSON in custody, he was in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant."

With regard to the issue of the voluntariness of the consent, petitioner relies almost exclusively upon this Court's decision in Schneckloth v. Bustamonte, 412 U.S. 219, 93 S.Ct. 2041 (1973). The tenor of petitioner's argument is that the only considerations relevant to a voluntariness determination under Schneckloth are those relating to the subjective impressions of respondent. A fair reading of Schneckloth, however, supports no such limitation. This Court has there stated that the proper focus is on the "totality of the circumstances." Such totality would appear to include more than the limited inquiry into the subjective state of the respondent. Schneckloth cites as support for its conclusion Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946). Two of the factors relied upon there with regard to the voluntariness determination were "the public character of the property" and the "existence of the right to inspect." These inquiries have no relevance with regard to the subjective state of the alleged consentor but, rather, bear upon the legality and appropriateness of the police conduct. This Court in Schneckloth went on to note that:

> "Two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent--the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." 412 U.S. at 227, 92 S.Ct. at 2048.

The language utilized with regard to "legitimate need" reflects the analysis made by this Court in the preceding

paragraphs of the Schneckloth opinion in which this Court stressed that the standards announced were a balance between a protection of the security of the citizenry and the necessity for effective and proper law enforcement. Thus, the Schneckloth determination would seem to include in each case an alaysis of whether the consent as obtained serves this legitimate police function. It thus becomes apparent that considerations as to the legality of the arrest and detention of respondent are completely relevant in determining the "voluntariness" of the consent. For, exploitation of illegal procedure does not serve the legitimate ends of effective law enforcement. The interpretation sought by petitioner would have the deleterious effect of encouraging to some degree an illegal detention or arrest in the hopes of obtaining a consent. However, there should be no right for an investigative agency to benefit from a situation which they had no right to create in the first instance.

This Court's reliance upon aspects of coercion in the Schneckloth opinion are also relevant. This Court specifically recognized the vitality of the argument expounded in Bumper v. North Carolina, 391 U.S. 543,

that coercion is implicit in any submission to a claim of lawful authority. In the present case, the exploitation of the illegal arrest is tantamount to the assertion of lawful authority found coercive in Bumper. In each case, the assertion of the right to initiate the questioning was based upon a non-existent authority. The position of the Court of Appeals below is thus wholly consistent with decisions of this Court. Moreover, it clearly reflects the stance taken by the Ninth Circuit in United States v. Rothman, 492 F.2d 1260, 1265 (1973). The Court there noted that:

> "This is not a case in which a consent search was necessary or proper. If

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> probable cause for a search was available the officers had ample time to get a warrant. (Citation omitted.) There was no risk that evidence would be lost or destroyed or that Rothman would flee. In short there was no justification for the coercive official tactics which produced this consent."

Finally, the impropriety of reliance upon the consent obtained during a term of illegal arrest conforms with numerous decisions which prevent the utilization of the fruits of such illegal detention or arrest. In Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974), the Court considered an automobile stop conducted without probable cause. During the term of the detention, consent to search was obtained and the Court determined that the items seized pursuant to the consent, as the fruit of the unlawful detention, should have been suppressed. Similarly, in United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), the Court determined that suppression was required as much as the items seized were the fruit of an illegal detention. See also Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959); United States v. Kandlis, 432 F.2d 132 (9th Cir. 1970).

3. The opinion of the Court of Appeals is completely consistent with both the pronouncements of this Court and decisions of the lower Federal Courts. This case is therefore inappropriate for consideration by this Honorable Court. Respondent therefore respectfully submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

/////

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DATED: January 24, 1975

Respectfully submitted,

MICHAEL D. NASATIR, of Nasatir, Sherman & Hirsch, Attorneys for Respondent

DONALD M. RE, of Newton, Re & Russell, Attorneys for Respondent

Supreme Court, U. S.
FILED
MAY 1 1975
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No. 74-538

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1974

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UNITED STATES OF AMERICA, PETITIONER

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HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-8A) is reported at 504 F. 2d 849.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9A) was entered on March 20, 1974. The government's petition for rehearing and suggestion for rehearing *en banc* was denied on September 5, 1974 (Pet. App. 10A). By order of October 2, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 4, 1974. The petition was filed on that date and was granted on

February 18, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest in a public place.

2. Whether a person unlawfully in custody is capable of giving a voluntary consent to a search of his automobile.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 18 U.S.C. 3061 provides:

> (a) Subject to subsection (b) of this section, officers and employees of the Postal Service performing duties related to the inspection of postal matters may, to the extent authorized by the Board of Governors—
>
> (1) serve warrants and subpenas issued under the authority of the United States;
>
> (2) make arrests without warrant for offenses against the United States committed in their presence; and

> (3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.
>
> (b) The powers granted by subsection (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

3. 39 C.F.R. 232.5(a) provides in relevant part:

> Postal Inspectors are authorized to * * *
>
> (3) Make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

STATEMENT

1. On August 17, 1972, Postal Inspector Frank Barbarick received a telephone call from Awad Khoury, an informant who had proved reliable on at least five prior occasions.[1] Khoury told Barbarick that respondent was in possession of a stolen Bank of America credit card in the name of Syed T. Ahmad and planned to turn the card over to Khoury (A. 12–13). Later that

[1] Khoury previously had provided Inspector Barbarick with information about certain associates of respondent whom postal inspectors had under investigation or had arrested for mail theft prior to August 17 (A. 51–52). The information received from Khoury was corroborated by the agents' investigation of the mail thefts and their interviews of postal inspectors and mail carriers (A. 53).

day Khoury met with Barbarick and turned over the credit card he had described (A. 13). Barbarick ascertained from the Bank of America that the credit card had been mailed on August 14, 1972, but had not been received by the intended customer.

Khoury told Barbarick that he and respondent had an agreement: respondent would furnish Khoury with additional credit cards stolen from the mail, and Khoury would purchase airline tickets and other merchandise with the cards (A. 14). Respondent had promised to reimburse Khoury for his "time and efforts" (A. 15). Barbarick instructed Khoury to set up another meeting with respondent to obtain the additional credit cards (*ibid.*). Although there was sufficient time to have obtained a warrant for respondent's arrest, Barbarick did not attempt to do so (A. 23). After several postponements, a meeting between Khoury and respondent was arranged for noon on the 23d of August at the Ship's Restaurant in Los Angeles (A. 16).[2] At the designated time, Khoury met with respondent. Two postal inspectors were stationed in the restaurant. Barbarick had instructed Khoury that if respondent were in possession of stolen credit cards, Khoury should light a cigarette as a signal to the surveilling agents in the restaurant; the agents then would activate a beeper signal informing the agents positioned outside of visual range (A. 17).

[2] On August 21, Khoury had informed Barbarick that there would be a meeting the next day. This meeting was cancelled by respondent, as was a meeting for the morning of August 23 (A. 15–16).

At this meeting Khoury learned that respondent had the credit cards outside in his car (Tr. 246).[3] Khoury lit a cigarette and the agents in turn activated their signal. Inspector Barbarick and other agents entered the restaurant and placed respondent under arrest for possession of stolen mail (A. 17–18), and specifically for possession of the card Khoury had turned over to Barbarick six days earlier (A. 23).

Postal inspectors immediately searched respondent, but they did not find any credit cards (A. 81). The inspectors escorted him out of the crowded restaurant. Once outside, respondent was informed by Inspector Barbarick (A. 18)

> [t]hat he had a right to remain silent. That anything he stated could be used against him. He had a right to an attorney before answering any questions. If he could not afford an attorney, one could be provided for him. And that if he wished to answer questions, he could stop at any time and request an attorney.

Respondent, who previously had been an informant for Inspector Barbarick and knew him well,[4] replied: "Frank [Barbarick], I understand my rights" (*ibid.*). Barbarick asked respondent where his car was parked, and respondent "pointed to a beige Monte

[3] Khoury did not tell the agents at the scene that the cards were in respondent's car (Tr. 246).

[4] Inspector Barbarick had known respondent for approximately a year and a half. Barbarick had arrested respondent in 1971 for mail theft, but the charges were dropped after respondent supplied information that led to the arrest of "a major violator in mail theft" (A. 33). During 1971 and 1972 additional information furnished by respondent led to other convictions for mail theft (A. 45; cf. A. 84–85).

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Carlo Chevrolet in the parking lot" (*ibid.*). The inspector asked (A. 18–19):

> "Can I look inside?"
>
> And he [respondent] said, "Go ahead."
>
> [Barbarick] said, "You know, if I find anything, it is going to go against you."
>
> And he [respondent] said, "Go ahead, there is nothing in there."

Using keys furnished by respondent after this series of warnings, request to search, consent, repeated warning, and reaffirmation of consent, Barbarick and another postal inspector searched the car. Under the floor mat they found two stolen credit cards, and these, together with the card provided by Khoury, formed the basis for the indictment returned against respondent (A. 19–20, 80–81).

2. Respondent was charged with four counts of possession of stolen mail, in violation of 18 U.S.C. 1708 (A. 6–7). Prior to trial he moved to suppress the stolen credit cards, arguing that Khoury was an unreliable informant, so that there was not probable cause to arrest respondent; that a warrant was required for respondent's arrest; and that the consent was defective because respondent had not been told that he could withhold his consent (A. 36–40). The district court denied the motion from the bench (A. 40). Respondent was convicted on the two counts charging possession of the two credit cards found in his automobile. He was acquitted on a third count charging him with possession of the stolen credit card

provided to Inspector Barbarick by informant Khoury. The fourth count was dismissed prior to trial.

3. A divided panel of the court of appeals reversed. The majority concluded that the information gathered by Inspector Barbarick on August 17 from a reliable informant, confirmed by the physical receipt of a stolen credit card, provided probable cause to arrest respondent (Pet. App. 5A). The court held, however, that because the officers had not sought or obtained a warrant for respondent's arrest during the six days between the acquisition of probable cause and the meeting at Ship's Restaurant, the arrest was unconstitutional. Relying upon *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480, the majority reasoned that an arrest warrant always is required in the absence of exigent circumstances. Because the court found no exigent circumstances here, it concluded that the arrest was improper.

Proceeding from the conclusion that respondent was under unconstitutional arrest, the majority then held that the consent to search the car was defective. Although it purported to adhere to the "totality of all the circumstances" test enunciated in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, the majority found that the consent was involuntary because respondent "was in custody in violation of the Fourth Amendment" (Pet. App. 7A). The court therefore held that, even in the absence of any other circumstance suggesting coercion, the credit cards must be suppressed.

Judge Goodwin, in dissent, expressed the view that law enforcement officers are not compelled to secure an arrest warrant or make an arrest "the moment they come into possession of enough evidence to cause a magistrate to issue a warrant" (Pet. App. 8A), and that they were entitled to arrest respondent on the basis of information (including the signal at the restaurant) provided by Khoury, a reliable informant. Judge Goodwin concluded that "[g]iven a lawful arrest, the only basis Watson urged in the trial court for his motion to suppress the evidence collapses" (*ibid.*).

SUMMARY OF ARGUMENT

I

At common law, warrants for arrest were viewed with suspicion. They could be used to harass enemies and escape tort liability for wrongful arrest or detention. The common law of England, state law, and our Fourth Amendment jurisprudence have used the requirement of probable cause, without any warrant requirement, to accommodate the conflicting interests of the individual in remaining free of unjustified restraints and of society in capturing those suspected of crime.

This Court has held that the general common law rule—that an arrest for a felony could be made without a warrant if there is probable cause—is congruent with the Fourth Amendment's requirement of reasonableness. At least where the arrest is made in a public place (and therefore does not require entry into a place where a warrant would be required in order to

make a search), this Court has never required a warrant to make an arrest on probable cause. The validity of that basic rule was recently reaffirmed in *Gerstein* v. *Pugh*, No. 73–477, decided February 18, 1975.

The fact that there was time to obtain a warrant does not affect the reasonableness of an arrest. An arrest always has been viewed as constitutionally reasonable if it is supported by probable cause, and the presence of probable cause does not depend upon obtaining a warrant. There is no reason for the Court now to depart from the established historical understanding. Moreover, although superficially the reasons for requiring warrants for searches might seem to apply to arrests as well, there are important logical and practical reasons for the distinction. The law of arrest historically has developed separate safeguards, such as the prompt post-arrest inquiry into probable cause, that guard against improper detention of a suspect.

Indeed, it might be counterproductive to attempt to compel officers to obtain and execute warrants as soon as they accumulate probable cause to do so. Sometimes the warrant would be executed before more thorough investigation had been completed, which investigation might be necessary either to accumulate the additional evidence necessary to convict (since far less evidence is necessary to make out probable cause than may be sufficient to convince a jury) or to demonstrate that, in spite of the information establishing probable cause, the suspect is innocent. Premature arrest risks both incarceration of the innocent and provision of an unjustified boon to the guilty.

On the other hand, if execution of the warrant is postponed in order to avoid the problems caused by premature arrest, a suspect might claim that he had been unfairly prejudiced by the delay. Moreover, the warrant would become of less value to the suspect, for as the investigation proceeded, new information would supplant the old and make the warrant "stale." In this case, information (Khoury's signal) acquired practically at the moment of arrest would have provided a better ground for arrest than a warrant issued five days earlier.

In short, if a warrant is obtained and executed immediately, it may disserve the interests of both suspects and the criminal justice system. If the warrant is obtained and execution is deliberately delayed while law enforcement officials continue their investigation of the case in a quest for confirmation or rebuttal of their initial suspicions, it becomes stale at the same time as the reasons for preferring a warrant to a hasty on-the-spot judgment dissipate. We submit that the requirements of the Fourth Amendment are fulfilled whenever the arrest is supported by probable cause.

II

It is not constitutionally unreasonable for an officer to seek, or act upon, a consent to search. The consent defines the individual's desire for privacy; to the extent an individual consents to a search, he is indicating that he does not wish to exclude the officers from particular areas in which he might otherwise establish a zone of privacy. But once he voluntarily allows inspection of that which he could keep hidden, he cannot complain that it was unreasonable for the officers

to accept the invitation, unless the words expressing consent were induced against his will.

Under the standards established in *Schneckloth* v. *Bustamonte,* 412 U.S. 218, a consent to search is effective unless it has been obtained as a result of duress or coercion. The presence of such coercion is to be evaluated upon the basis of the totality of all the circumstances, and no one factor possesses a determinative significance. Accordingly, even if the Court concludes (or assumes for the purpose of discussion) that respondent's arrest was unconstitutional, his consent to search was effective.

Schneckloth held that this inquiry would utilize the standards developed in cases dealing with the voluntariness of confessions. The test is not whether the consent was "informed" or "wise", but whether it was the result of such official pressure that the conduct of the officials can be deemed "unreasonable" under the Fourth Amendment. We submit that the arrest and custody of an individual, like his knowledge (or lack of knowledge) of the ability to withhold consent, is simply one factor among many to be considered in ascertaining whether officials improperly induced the individual to consent to the search. Arrest and confinement take many forms, from lengthy stationhouse interrogation (in which improper inducement might often be found) to brief, relatively spontaneous open-air discussions, such as the one in this case, in which there are no indicia of duress. The variety of circumstances that can accompany the fact of custody counsel against a *per se* rule. The courts should look to the circumstances present during the custody and inquire

whether those circumstances demonstrate coercion or duress.

Within this framework, it is irrelevant whether the arrest was proper or improper. Considerations of "fruit of the poisonous tree" aside, the legality or illegality of an arrest usually does not enter the consciousness of either the suspect or the officers. And, if the suspect does not know of the circumstances that will cause a court to hold at some time in the future that his arrest was improper, then he cannot be influenced by those considerations, and they cannot subject him to duress or coercion.

In this case respondent did not know that probable cause to arrest him had arisen six days previously. He did not know that the officers had not obtained a warrant during the interval, and neither he nor the officers could have known that the court of appeals would subsequently hold that a warrant was required. Consequently, respondent's consent must be evaluated as if he had been under a proper arrest. When those standards are applied, there are no grounds upon which to assail his consent. Respondent was familiar with his rights and was personally acquainted with the arresting officer. The discussion preceding the search was brief and friendly, and respondent cooperated in the search by providing the car keys. Respondent had received *Miranda* warnings, and therefore knew that he could refuse consent by standing silent. Even after he gave his consent, the arresting officer allowed him an opportunity to reconsider his decision and warned him that any evidence found would be used against him. The record is devoid of

evidence suggesting that respondent was coerced into extending his consent. The consent was therefore effective, and the credit cards found in the search were properly admitted into evidence.

ARGUMENT

The ultimate holding of the court of appeals in this case was that respondent's convictions had to be reversed because the two credit cards seized from under the floor mat of his automobile were the product of an illegal search and should have been suppressed. The search was illegal because conducted upon the authority of a consent that the court considered to have been invalid. The consent was invalid, in the court's view, because given while respondent was under illegal arrest. The arrest was illegal, said the court of appeals, because made without a warrant although there had been sufficient opportunity to procure one following the acquisition of initial probable cause six days prior to the arrest.

We submit that the conclusion of the court of appeals was erroneous. The failure of any step in the chain of reasoning the court used would suffice to undermine its decision; as we now show, each step was faulty. In the argument that follows, we first consider, as did the court of appeals, the question of the legality of the warrantless, probable cause arrest of respondent. Having argued in Part I that the arrest was lawful, we contend in Part II that, regardless of the legality of the arrest, respondent could and did validly consent to the search of his automobile. The seizure of the stolen credit cards found during that

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search therefore was proper, and the cards were admissible in evidence against him at his trial.

I. NO WARRANT IS NECESSARY TO MAKE A PROBABLE CAUSE ARREST IN A PUBLIC PLACE

A. PROBABLE CAUSE SATISFIES THE FOURTH AMENDMENT'S REQUIREMENT OF REASONABLENESS

An officer making an arrest, and a court considering the propriety of that arrest, must balance several important interests. On the one hand, the individual has an interest in the preservation of his liberty, and particularly in remaining free from restraint that ultimately proves to have been unnecessary. On the other hand, society has a pressing interest in the apprehension of individuals who have committed crimes, so that they may be brought to justice.

Historically, this conflict of interests has been mediated by the requirement that probable cause support every arrest. This is a stringent requirement. The arresting officers must know of facts and circumstances "sufficient to warrant a prudent man in believing that the [individual] had committed or was committing an offense." *Beck* v. *Ohio,* 379 U.S. 89, 91. Cf. *Locke* v. *United States,* 7 Cranch 339, 348. Adherence to the requirement of probable cause protects the individual's interest in his liberty while allowing society to vindicate its own interests in criminal justice.[4]

[4] We refer here only to full custodial arrests. As *Terry* v. *Ohio*, 392 U.S. 1, established, some investigative detentions have many of the traditional characteristics of an arrest, yet are reasonable under the Fourth Amendment when based upon a founded suspicion not amounting to probable cause. The question of when an "arrest" that must be supported by "probable cause" has occurred can be a vexing one (see, *e.g.*, *United States* v. *Calihan*, C.A. 9, No. 74-2471, decided February 18, 1975), and there may be circumstances in which a brief, investigative "arrest" would be considered reasonable although probable cause is lacking. Here, however, we deal with a full custodial arrest for charging purposes; we agree that such arrests, to be lawful, must be supported by probable cause.

This requirement of probable cause for arrest considerably antedates the Constitution. In English common law, arrests *with* warrants were viewed with considerable suspicion, because a warrant would permit an arrest by an officer unfamiliar with the facts of an offense and thus would enhance the possibility of wrongful arrest. So, too, warrants could be sworn out by a vengeful individual and could be used to enlist a public officer in a private vendetta; warrants could be used to vex an enemy while insulating the accuser from liability for false arrest or false imprisonment.[5]

Under the common law, an arrest without a warrant was permissible whenever an officer (or a private individual) had a "reasonable suspicion" that a per-

[5] See 1 Chitty, *Criminal Law* 32, 53–54 (5th ed. 1847). Coke contended that only a person "that knoweth or hath suspicion of the felony" could make an arrest, and that a justice of the peace could not, by issuing a warrant, transfer this power of arrest to a stranger to the crime. Coke, *Fourth Institute of the Laws of England* 177 (1797). See also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 50; 10 Halsbury, *Laws of England* 342–351 (3d ed. 1955). Telford Taylor, referring to our own Constitution, has written in a similar vein: "* * * [O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern." Taylor, *Two Studies in Constitutional Interpretation* 41 (1969).

son had committed a felony. 2 Hale, *Pleas of the Crown* 75–84 (1st Am. ed. 1847). The phrases "probable cause" and "reasonable grounds" have also been employed to describe the basis for a lawful arrest. The three terms appear to be interchangeable for this purpose. The common law's accommodation of the conflicting interests has survived the test of time. Every State allows warrantless felony arrests to be made on probable cause or its equivalent; numerous federal statutes expressly provide for such arrests; and the American Law Institute's *Model Code of Pre-Arraignment Procedure* § 120.1 (Official Draft No. 1, 1972) adheres to the same rule. We have collected the state and federal rules in the appendix to this brief (pp. 40–47, *infra*).[6]

With specific reference to the arrest of respondent, we note that Congress has provided in 18 U.S.C. 3061 that an employee of the Postal Service may arrest without warrant for a felony if he has "reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." This grant has been confirmed by the regulations of the Postal Service, 39 C.F.R. 232.5(a)(3); it authorized Inspector Barbarick's apprehension of respondent.[7]

This Court too has concluded that a warrantless

[6] The most comprehensive discussion of the common law of arrest is Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 673, 798 (1924) (see especially pages 684–689).

[7] 18 U.S.C. 3061 has been upheld by implication in *United States* v. *Gibson*, 462 F. 2d 400 (C.A. 5), and *Ray* v. *United States*, 412 F. 2d 1052 (C.A. 9). Section 3061 was enacted in 1970 because the courts of appeals were divided on whether its predecessor (39 U.S.C. (1964 ed.) 3523(a)(2)(K)) authorized warrantless arrests. Compare *Alexander* v. *United States*, 390 F. 2d 101 (C.A. 5) (no); with *Neggo* v. *United States*, 390 F. 2d 609 (C.A. 9), and *United States* v. *Alexander*, 415 F. 2d 1352 (C.A. 7) (yes).

arrest is reasonable within the meaning of the Fourth Amendment if it is supported by probable cause. It stated in *Carroll* v. *United States*, 267 U.S. 132, 156–157:

> * * * [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll*, this Court repeatedly and without deviation has upheld warrantless arrests on probable cause.[8] One of those cases, *Henry* v. *United States*, 361 U.S. 98, involved 18 U.S.C. 3052, a statute authorizing (in words identical to those in Section 3061) agents of the Federal Bureau of Investigation to make warrantless arrests. The Court, speaking through Mr. Justice Douglas, held that the statute "states the constitutional standard" (361 U.S. at 100).

The majority of the court below concluded, however, that the authority of this body of precedent has been terminated by the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 476–481. The majority held that because Inspector Barbarick had not obtained a warrant, and because the government had not demonstrated exigent circumstances justifying an

[8] See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 294–295; *Beck* v. *Ohio*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471, 479–480 (standards for assessing probable cause may be more stringent if no warrant is obtained); *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Trupiano* v. *United States*, 334 U.S. 699, 705. Some of these cases involve situations like the instant one, in which there would have been ample time to obtain a warrant.

arrest without a warrant, the arrest was unconstitutional (Pet. App. 5A–6A). We disagreed with this analysis in our petition for certiorari (Pet. 7–8) but conceded that *Coolidge* had produced some uncertainty in what previously had been a settled area of law. Since we filed our petition, this Court has clarified the boundary of the area of uncertainty.

We contended in our petition (Pet. 7–9) that the pertinent portion of the discussion in *Coolidge* was concerned only with arrests that take place in private homes; such arrests involve not only a deprivation of liberty but also an invasion into an area of privacy protected by the Constitution. But in this case the arrest took place in a public restaurant where the officers, even without a warrant or probable cause to arrest, had every right to be. The correctness of our analysis would now seem apparent from the treatment of the subject in *Gerstein* v. *Pugh*, No. 73–477, decided February 18, 1975, in which the Court observed that probable cause arrests have never been invalidated solely because officers failed to obtain a warrant and implied in the plainest terms that the issue of warrantless arrest remains unsettled only to the extent that it involves entry into a home (or other private place) to make an arrest. Slip op. 9–10 and n. 13. Because the arrest in this case occurred in a public rather than in a private place, *Coolidge* does not affect it.[9]

[9] We have no occasion in this brief to discuss the propriety of the issue left open in *Coolidge* and *Gerstein*—the entry into a private place to make a warrantless arrest.

B. AN ARREST WARRANT IS NOT CONSTITUTIONALLY REQUIRED SIMPLY BECAUSE THERE IS OPPORTUNITY TO OBTAIN ONE

The Court's reaffirmance in *Gerstein* of the traditional and virtually universal (see Appendix, *infra*) Anglo-American doctrine that warrantless felony arrests are lawful if predicated on probable cause does not reasonably admit of an exception for cases in which there was opportunity to procure a warrant. In the absence of adequate time to obtain a warrant, the emergency exception to the requirement of search warrants would permit even a warrantless, probable cause search, so the discussion of arrests in *Gerstein* (and the authorities on which it relied) logically must have been intended to cover the non-emergency situation, in which there is adequate time to obtain a warrant. However, since *Gerstein* contained no explicit, independent discussion of the distinction that theoretically could be drawn between emergency and non-emergency situations, we now turn to the question whether the arrest in this case was improper because Inspector Barbarick could have obtained a warrant during the six days between the time Khoury provided him with the initial credit card and the meeting at the restaurant.[10]

[10] Even if warrants ordinarily should be obtained in non-emergency situations, there is an independent and reversible error in the reasoning of the court of appeals. Respondent's possession of additional stolen credit cards was a separate offense as to which the agents acquired probable cause only at the time Khoury gave the prearranged signal at the restaurant. Accordingly, even if the officers could not lawfully have arrested respondent on the charge of theft of the credit card that Khoury had turned over to Barbarick six days earlier, there

Presumably, the argument that warrantless probable cause arrests are unlawful when there has been opportunity to obtain a warrant must seek its theoretical basis in an analogy to the principles regarding the need for warrants in conducting searches. However, the analogy fails for historical, logical, and practical reasons. The first of these alone would suffice to support the lawfulness of the arrest in the present case. Courts and legislatures have for centuries and with great uniformity drawn the distinction between arrests and searches when considering the need for warrants. It is thus likely that this Court is "foreclosed by principles of *stare decisis* from further examination into history and practice" (*United States* v. *Robinson,* 414 U.S. 218, 230), but even if it is not, *Robinson* teaches that great weight must be given the historical understanding in such matters. The historical support for the validity of warrantless arrests far

was a valid ground to arrest for the later offense. (Surely, for example, the prior failure to procure a warrant could not have rendered the officers powerless to arrest respondent had they acquired probable cause to believe he was in possession of drugs or counterfeit currency. No more should they have been powerless to arrest for a different theft of mail by respondent.)

Although Inspector Barbarick testified that the arrest was being made for the earlier theft (A. 23), which perhaps explains why the court of appeals did not recognize this alternative basis for sustaining the legality of the arrest, we do not believe that the subjective intentions of the arresting officers are controlling. There was fresh probable cause relating to an independent offense and no prior opportunity to obtain an arrest warrant for that offense; accordingly, even were the court of appeals correct in concluding that an arrest based on "old" probable cause is unlawful without a warrant, its belief should not have been accorded controlling effect in the present case.

exceeds that establishing the broad scope of search of the person incident to arrest that was at issue in *Robinson.*[11]

Moreover, even were the Court writing on a clean slate, there are sound conceptual bases for the distinction between searches and arrests. As is apparent from the plain view exception to the warrant requirement, it is not the act of seizure itself (whether of property or of the person), but rather the invasion of a constitutionally protected zone of privacy, that requires antecedent magisterial evaluation. Had the stolen credit cards been in plain view on the restaurant table, they could have been seized without a warrant even had there been prior opportunity to obtain one. Since no search was required to ascertain respondent's whereabouts, and because the agents did not invade a zone of privacy in the public restaurant, the seizure of his person through arrest was lawful if supported by probable cause.

There is another important distinction between the seizure of a person (by arrest) and the search for and seizure of property. Although a return must be made on a search warrant, property seized in a warrantless search is not promptly accounted for to a judicial officer, nor is the propriety of the seizure evaluated in any manner by such an officer, unless and until the person from whom the property was seized moves for the suppression or return of the property.

[11] The Court followed a similar course in *Gerstein*, relying upon historical practice in support of its conclusion that an arrest followed by an informal inquiry into probable cause satisfies the constitutional requirement of reasonableness.

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By contrast, an arrested person must be taken promptly before a magistrate and a sworn complaint or verified information filed establishing at least *prima facie* justification for his continued detention. This complaint or information is, in turn, subject to prompt review in an informal determination of probable cause (*Gerstein, supra*). An arrest without a warrant is, therefore, subject to prompt judicial scrutiny that is not afforded in the case of warrantless searches and seizures. Because of this important difference—justified by the effect of arrest on the individual's interest in his own liberty and privacy [12]—searches and seizures of property cannot properly be analogized to arrests. The availability of prompt post-arrest review by a judicial officer diminishes the need for pre-arrest evaluation by a neutral and detached magistrate that is perceived in the case of a search (see pages 25–26, *infra*).

Apart from historical, theoretical, and structural distinctions, the creation of a warrant requirement for arrests in public places would not be of significant practical utility in striking a fair balance between the legitimate interests of the individual in being free of unjustified arrest, on the one hand, and the legitimate needs of law enforcement on the other.

A requirement that a warrant for arrest be obtained as soon as public officials have accumulated probable cause to arrest would put an unnecessary and unfortunate premium upon haste in law enforcement and would create a substantial incentive to ter-

[12] See *Robinson*, *supra*, 414 U.S. at 237–238 (Powell, J., concurring).

minate an investigation prematurely. Even after they have probable cause to arrest, officers often attempt to obtain additional evidence, as they did here. This serves at least two valuable purposes. First, evidence that constitutes probable cause to arrest often is not sufficiently weighty to establish guilt beyond a reasonable doubt. If officials terminate their investigation, obtain a warrant, and arrest a suspect as soon as they have probable cause to do so, many guilty individuals would go free because there would be insufficient evidence to convict. Indeed, in this case the jury acquitted respondent on the count charging him with possession of the card he gave to Khoury, although it was his probable felonious possession of that card that the court of appeals believed established probable cause to arrest him.

The second purpose is closely related and also is illustrated by this case. Because probable cause is established when there exists a reasonable and supported suspicion of crime that may fall far short of certainty, often there will be probable cause to arrest innocent individuals. A continued investigation (rather than an immediate arrest) may vindicate such suspects and avoid unnecessary disruption of their lives. Inspector Barbarick responsibly continued his investigation; even though Khoury was apparently reliable and had provided corroboration of his story, he was not absolutely trustworthy. Informers who are reliable in many instances may nevertheless be mendacious or simply misinformed in a particular case. By continuing the investigation, Inspector Barbarick was able to minimize the risk that respondent

would be arrested for a crime he had not committed.

A rule that an agent must secure a warrant as soon as he has obtained probable cause would expose officials to the dilemma rejected—in the Sixth Amendment context—in *Hoffa* v. *United States,* 385 U.S. 293, 310. Police would be required at their peril to ascertain the exact moment that the courts will later hold that they acquired probable cause to arrest, and thereupon to secure a warrant without delay. If they fail to recognize that they had probable cause, but rely upon other indicia of guilt (such as Khoury's signal at the restaurant), they risk suppression of their later discoveries. On the other hand, if the officers obtain a warrant but delay execution in order to gather additional evidence, they may be criticized for deliberately postponing execution for the purpose of "prejudicing" a defendant. See, *e.g., Godfrey* v. *United States,* 358 F. 2d 850 (C.A.D.C.).

Furthermore, the longer the officers postpone arrest while continuing an investigation, the less useful a warrant would become as a shield against unjustified or unreasonable behavior. If the arrest is substantially delayed, the officers will have opportunity for reflection whether or not they possess a warrant. As additional evidence is gathered during the investigation, the initial grounds for issuance of the warrant may either be discredited or supplanted by other and more persuasive grounds that support the arrest.[13] Under the decision below, the officers risked a viola-

[13] Khoury's signal at the scene of the arrest would by itself have furnished probable cause to arrest respondent, and it strongly reinforced the preexisting probable cause.

tion of the Fourth Amendment if they waited too long and a violation of the Fourth Amendment if they acted too soon. Yet at the same time the rule would provide little, if any, meaningful protection to individual interests.[14]

Even if a warrant requirement would be advantageous to the individual, however, it is not constitutionally required. Although "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, * * * such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Gerstein, supra, slip op.* at 9. Under the Fourth Amendment, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 10. Once the individual has been arrested without a warrant, he is (in the federal system) promptly brought before a magistrate (Fed. R. Crim. P. 5(a)) and, within a few days, afforded a preliminary examination inquiring into probable cause (Fed. R. Crim. P. 5.1). This sequence of arrest with probable cause, followed by judicial appearance and inquiry, is more than adequate to satisfy

[14] An ironic result of the reasoning of the majority below is that police may be best off should the magistrate decline to issue a warrant when first approached. The officers then would be free to continue their investigation. As in the instant case, they could arrange to gather additional evidence and then arrest, on the spot, on the basis of this new evidence plus exigent circumstances. For example, it could be argued that such circumstances were present here; had respondent left the restaurant without being arrested, he could have secreted the credit cards or even escaped entirely.

the reasonableness requirement of the Fourth Amendment. As the Court concluded in *Gerstein, supra,* slip op. at 12, "there are indications that the Framers of the Bill of Rights regarded [a less strigent procedure] as a model for 'reasonable' seizure." In sum, there is neither logical justification nor historical support for a rule that would require officials to obtain a warrant in order to make a probable cause arrest in a public place.[15]

[15] Although the Constitution does not make a warrant a prerequisite to a valid arrest, there are nevertheless substantial incentives for officers to obtain warrants. When the existence of probable cause is open to reasonable question, officers will be induced to seek a warrant because of this Court's indication (see *Wong Sun, supra,* 371 U.S. at 479–480) that the propriety of the arrest will be more favorably assessed if the officers' belief that they possessed probable cause has been supported by a detached judicial officer. See also *United States* v. *Ventresca,* 380 U.S. 102, 106; *Aguilar* v. *Texas,* 378 U.S. 108, 111. Similarly, when the existence of probable cause is in doubt, it will be advantageous for officers to submit their evidence to a magistrate in advance because, if probable cause is lacking, the magistrate may so inform them. They then will be able to refrain from making an improper arrest that results in suppression of their discoveries and the inability to prosecute those guilty of crime. In short, whenever the existence of probable cause is a close question, officers will tend to seek warrants, for they stand to gain whether a warrant is issued or refused. In other cases—where the existence of probable cause to arrest is obvious—the need to submit the evidence in advance of arrest is correspondingly diminished (from the point of view of both public officials and suspects), because the interposition of the judgment of a detached judicial officer will "protect" a suspect against improper arrest only when the existence of probable cause is a close question.

Because of the substantial incentives to obtain a warrant in close cases, it is the standard practice of the Federal Bureau of Investigation to present its evidence to the United States Attorney, and to obtain a warrant, before making an arrest.

II. RESPONDENT EFFECTIVELY CONSENTED TO THE SEARCH OF HIS AUTOMOBILE, REGARDLESS OF THE LEGALITY OF HIS ARREST

A. A CONSENT TO SEARCH IS EFFECTIVE UNLESS IT IS THE PRODUCT OF DURESS OR COERCION

The Fourth Amendment secures the people against unreasonable searches and seizures and thereby protects legitimate expectations of privacy in both their possessions and their personal lives. *Katz* v. *United States,* 389 U.S. 347. But while the Amendment protects an individual against forceful or surreptitious intrusions, if unreasonable, it does not prohibit public officials from going where they have been invited. Cf. *Lewis* v. *United States,* 385 U.S. 206. The scope of the individual's legitimate expectations of privacy is defined not only by the structure of the society in which we live but also by the individual's own desire to shield his possessions or activities from inspection. If one does not desire to exclude strangers from his property—that is, if he consents to a search—he has diminished to that extent the area of privacy within which the Fourth Amendment protects him.

It is not constitutionally unreasonable for officers to seek consent; any individual may ask another for permission to use or inspect the latter's possessions. Nor is it constitutionally unreasonable for an officer to proceed upon such consent once it is given. Indeed, seeking such consent should be a preferred course for law enforcement officers, because it is more respectful of the desires and privacy of the individual than are the alternatives, such as warrants, that call upon the

force of the state to overcome the resistance of a citizen. When an officer is proceeding by consent, he invades no area that the citizen desires to keep hidden from view.

Moreover, consent can be a valuable device in any investigation into crime, for it permits an officer to inspect areas that otherwise would be closed because he lacks probable cause. Such searches by consent may disclose valuable evidence; they also may reveal information that leads officers to abandon an investigation and spare a suspect the use of more intrusive techniques that otherwise might have been both necessary and justified.

Accordingly, this Court has on many occasions approved and encouraged law enforcement officials to rely upon searches by consent.[16] Two terms ago, in *Schneckloth* v. *Bustamonte, supra,* the Court considered for the first time the standards by which the effectiveness of a consent would be judged.

In *Schneckloth,* a car was lawfully stopped by officers while traveling on a highway. Although there was probable cause to arrest the driver for traffic violations, the officers did not do so. In a brief but friendly exchange that followed, consent was given to a search of the car. The search produced evidence leading to Bustamonte's conviction. He contended that the search was unconstitutional because the occupants of the car had not been warned that they could refuse to consent to a search. The Court rejected that contention and

[16] See, *e.g., Katz, supra,* 389 U.S. at 358, n. 22; *Vale* v. *Louisiana,* 399 U.S. 30, 35; *Davis* v. *United States,* 328 U.S. 582, 593–594; *Zap* v. *United States,* 328 U.S. 624, 630; *Bumper* v. *North Carolina,* 391 U.S. 543.

instead held that a consent is effective unless the "defendant's will [is] overborne in a particular case" (*Schneckloth, supra,* 412 U.S. at 226).

The Court's analysis demonstrated that a challenge to the effectiveness of a consent is not to be evaluated primarily by the particular warnings that the officers may have given in procuring the consent, or by establishing the existence of a knowing and deliberate "waiver" of the right to preclude a search. This is so because, as the Court recognized, there is an important difference between the "waiver" of rights that secure the accused a fair trial and a consent allowing a stranger to inspect one's property (*id.* at 241–243). A consent to search does not surrender a right vital to the ascertainment of truth in criminal proceedings, but instead relinquishes a portion of the zone of privacy that the individual otherwise might shield from official intrusion. Only after the individual has marked off the extent of privacy he desires (or will insist upon) is it meaningful to inquire whether there has been an unreasonable invasion of that zone. Consequently, the effectiveness of a consent is to be judged by whether the individual's actions establishing the zone of privacy for which he demands respect are the result of his free will, or whether that will has been overborne by official action.

This inquiry requires a court to ascertain whether the "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied," which, in turn, requires an assessment of "the totality of all the circumstances" that might be relevant to the individual's decision (*id.* at 227). Each influence

that might overbear the suspect's will must be considered, for if the individual has been improperly induced to constrict the zone of privacy from which he will exclude strangers, then the officials have behaved unreasonably under the Fourth Amendment. But if, on the other hand, this examination of all factors, not giving controlling weight to any of them, discloses that the individual's choice was his own, the officials are entitled to act in accordance with the consent.

In the instant case the majority below paid only lip service to the standards enunciated in *Schneckloth*. We submit that the record contains overwhelming evidence that respondent fully understood his rights and voluntarily agreed to the search of his car. The essential facts are undisputed. Immediately after his arrest, respondent was given *Miranda* warnings. As a result of these warnings respondent knew that he had no obligation to converse further with the arresting officers and that he had every right to respond with silence to Inspector Barbarick's request to search the car. Respondent was not a neophyte at these procedures; he had been arrested before and had also served as an informant for Inspector Barbarick, with whom he was on a first-name basis. There was no animosity at the time of the arrest.

Respondent was familiar with his constitutional rights, including the right not to speak to the officers, and at one point after his arrest even suggested to Inspector Barbarick that he not bother to explain these rights again (A. 48–49). Although he was in

custody when he gave his consent, it was not in a stationhouse atmosphere, nor was there extended questioning. Respondent consented immediately upon being asked and voluntarily gave Inspector Barbarick the keys to his car. After he gave his initial consent, respondent was informed that anything that was found would be used against him. This warning included within it the implicit advice that consent need not be extended. But respondent immediately reaffirmed his consent, with the remark that there was nothing in the car. We submit that if respondent's consent under these circumstances was not effective, then the vast majority of consents upon which officers rely in their daily work are invalid.

The court of appeals stated that two factors indicated coercion: first, that respondent had not been advised of his right to withhold consent; and second, that respondent was in custody in violation of the Fourth Amendment (Pet. App. 6A–7A). The first of these factors was involved in *Schneckloth* itself, and the Court held that failure to inform an individual that he could withhold consent was not fatal. Moreover, while one ignorant of his right to withhold consent could nevertheless validly give consent, it is also apparent from *Schneckloth* that knowledge of the right to withhold consent—whether derived from an express warning or otherwise—will result in an effective consent. The record in this case supports an inference that respondent knew that he could withhold consent. This advice is fairly implicit in the *Miranda*

warnings given to respondent [17] and also is implicit in Inspector Barbarick's warning, after respondent's first consent, that he should reconsider because anything found in the car could be used against him. If respondent in fact knew that he had a right to withhold consent, then the Inspector's failure to warn him explicitly could not possibly have coerced him.

We turn, then, to the majority's second ground—that coercion is shown because respondent was "in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant" (Pet. App. 7A). As we argue below, neither the fact of custody, nor any illegality of that custody, establishes coercion or duress sufficient to invalidate the consent.

B. CUSTODY IS SIMPLY ONE FACTOR TO BE CONSIDERED IN ASCERTAINING WHETHER THERE WAS COERCION OR DURESS

The consent with which the Court dealt in *Schneckloth* was given before anyone was taken into custody, and the Court remarked upon this factor several times (412 U.S. at 221, 240–241, n. 29, 247, 248). Respondent has contended, in his brief in opposition to certiorari, that consents given while in cus-

[17] All courts of appeals that have considered the matter—including the Ninth Circuit—have concluded that advice that an individual need not consent to a search, and can withhold consent by remaining silent, is implicit in the *Miranda* warning. See, *e.g.*, *United States* v. *Heimforth*, 493 F. 2d 970 (C.A. 9), certiorari denied, 416 U.S. 908; *United States* v. *Jones*, 475 F. 2d 723 (C.A. 5); *White* v. *United States*, 444 F. 2d 724 (C.A. 10); *United States* v. *Goosbey*, 419 F. 2d 818 (C.A. 6); *Government of the Virgin Islands* v. *Berne*, 412 F. 2d 1055 (C.A. 3), certiorari denied, 396 U.S. 837; *Gorman* v. *United States*, 380 F. 2d 158 (C.A. 1).

tody should be held ineffective *per se* (Memo. in Opp. at 9–11). But no court has accepted that view, and we submit that, although custody is one factor that must be considered in determining whether there was coercion or duress, it is not necessarily determinative.[18]

Most of the cases to which the Court referred in *Schneckloth* to establish the standard for identifying duress or coercion were cases involving custodial interrogation. "In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." 412 U.S. at 226. The Court then held that it would apply to consent search cases a standard similar to that previously used to determine whether a confession had been coerced. Accordingly, as in the confession cases, the presence or absence of custody, and the length and conditions of that custody prior to the confession or consent, are simply factors

[18] In three cases, including two decided subsequent to the decision in the instant case, the Ninth Circuit has held that custody is simply one factor to be considered under the standards of *Schneckloth*. See *United States* v. *Townsend*, 510 F. 2d 1145 (C.A. 9); *United States* v. *Heimforth*, *supra*; *United States* v. *Rothman*, 492 F. 2d 1260, 1263–1264 (C.A. 9). Every other court to consider the question has come to the same conclusion. See *United States* v. *Miley*, C.A. 2, No. 74–2207, decided March 19, 1975 (slip op. 2378); *United States* v. *Campbell*, C.A. 4, No. 74–1843, decided February 19, 1975 (slip op. 6) (reported without opinion at 510 F. 2d 967); *Weeks* v. *Estelle*, 509 F. 2d 760, 766 (C.A. 5); *United States* v. *Garcia*, 496 F. 2d 670, 673–674 (C.A. 5); *United States* v. *Horton*, 488 F. 2d 374 (C.A. 5); *United States* v. *Legato*, 480 F. 2d 408 (C.A. 5).

(albeit important ones) to be considered. No one factor is determinative.

Many distinct types of situations are comprehended within the term "arrest" and "custody." They may include, as they did here, the apprehension and detention of a suspect without confinement or lengthy interrogation. The suspect and the officers may know each other, and subsequent conversation may be congenial and free-flowing. In such circumstances the mere fact of custody does not carry with it indicia of coercion—there was here no "force, threats, [or] intimidation" (*Weeks* v. *Estelle,* 509 F. 2d 760, 766 (C.A. 5)). On the other hand, custody may be lengthy and unfriendly; the accused may be held and subjected in a confined stationhouse atmosphere to repeated questioning and may grudgingly yield his "consent" only after repeated refusals. In the latter case a court reasonably might find coercion or duress arising out of the custody. But the evidence that might establish coercion or duress does not come from the mere fact of custody. It flows, instead, from the attributes of that custody in the particular case and the effect those attributes had on the suspect who challenges the voluntariness of his consent.

The diversity of circumstances that may accompany an arrest counsels against a *per se* rule that a person in custody cannot give a consent to search, just as it has counseled against a *per se* rule that a person in custody cannot confess to crime. In either case, coercion or duress must be established on the particular facts of the case.

In many ways, indeed, the fact of arrest may tend to persuade a suspect to withhold consent rather than to grant it. If an individual knows he is suspected of crime but has not yet been arrested, he may often be tempted to "consent" to a search in the hope that, either because the officers will search poorly or because the evidence is well hidden, the search will reveal nothing and the suspicion will be dispelled. On the other hand, a suspect under arrest would understand that there is much less chance that he will be released if a search yields no new evidence; therefore, there is less inducement to consent. Moreover, a suspect under arrest almost invariably will be given *Miranda* warnings, and these warnings carry with them the implicit advice that, by remaining silent, the suspect can withhold consent.[19] An individual not yet under arrest does not receive these warnings and therefore is less likely to appreciate that he can withhold consent.

C. THE FACT THAT A PARTICULAR ARREST MAY BE UNCONSTITUTIONAL DOES NOT AFFECT THE *SCHNECKLOTH* STANDARDS

If, as we have argued above, the effectiveness of a consent given by one in custody is to be judged under the *Schneckloth* standards, then it follows directly that an individual in unconstitutional custody can consent to a search.[20] The consent is effective

[19] See cases cited at note 17, *supra.*

[20] While the discussion of this matter by the court of appeals is framed entirely in terms of measurement of the validity of respondent's consent on the basis of its voluntariness, it could be argued that a consent that is voluntary under *Schneckloth* standards is nevertheless ineffective when it is the "fruit"

unless it was induced by duress or coercion, and the presence of duress or coercion must be assessed in

of an illegal arrest. The alleged invalidity of an arrest would, of course, be relevant to such a contention, which is similar to the issue before the Court in *Brown* v. *Illinois*, No. 73–6650, argued March 18, 1975, in which the question presented concerns the admissibility of a confession made during a period of apparently unconstitutional detention.

The distinction between a voluntariness analysis and a "fruits" analysis will often be one of surpassing subtlety, since custody is a circumstance the effects of which must be weighed, and the coercive aspects of which assessed and discounted, before a court can conclude that the consent was voluntary. Ordinarily, then, the finding that consent was freely given in a particular case notwithstanding the impact of the custody in which the consenter was held will substantially undermine the causal relationship that is a necessary predicate to the "fruit" finding.

Accordingly, the circumstances in which a "fruits" analysis will produce a different result from the *Schneckloth* voluntariness inquiry are perforce limited. Such a different result would be appropriate, if ever, only in the narrow circumstances in which it is found that the officers have engaged in substantial or intentional unconstitutional behavior for the purpose of securing or inducing the subsequent consent. Cf., *e.g.*, *United States ex rel. Gockley* v. *Myers*, 450 F. 2d 232 (C.A. 3); *United States* v. *Kilgen*, 445 F. 2d 287 (C.A. 5) (by implication); *United States* v. *Edmons*, 432 F. 2d 577 (C.A. 2). In such a situation, but not otherwise, the exclusionary rule could serve its intended function of deterring unconstitutional conduct by the police. There is no evidence in the instant case that the conduct of Inspector Barbarick was intentionally unlawful—far from it. Inspector Barbarick could not have anticipated that the court of appeals would set aside a great body of precedent and require a warrant for a probable cause arrest. Nor is there evidence that the arrest was a pretext used in order to gain the opportunity to induce respondent to consent to a search.

the light of the totality of the circumstances. The "totality of all the circumstances" is not considered in the abstract, as part of a search for circumstances a court might find distasteful for one or another reason. The circumstances are instead to be considered, in their entirety, for evidence that might show that the suspect was subject to coercion or duress. Unless they bear on duress or coercion, the circumstances surrounding the consent are irrelevant.

One of the requisites of duress or coercion, whether express or implied, blatant or subtle, is knowledge of the pertinent circumstance by the person giving consent. Unknown or unknowable factors simply are not relevant under *Schneckloth*, because they can not have influenced the decision to consent. In the instant case, for all respondent knew, his arrest was entirely legitimate. Respondent did not know that Khoury had informed on him six days previously, giving the agents sufficient time to obtain a warrant. Respondent did not know that no warrant had been obtained. Neither he nor the officers knew that the court of appeals would suddenly depart from many years of precedent and require a warrant for his arrest. Because the factors relied upon by the court of appeals to establish the invalidity of respondent's arrest never entered respondent's consciousness, they cannot have affected his decision to consent to a search of his car. Accordingly, they are irrelevant, and his consent should be evaluated as if respondent had been under constitutional arrest. And, as we have demonstrated above, his consent is

effective under the standards properly applied to an individual in custody.[21]

Consideration of extraneous material that does not bear on duress or coercion would seriously deform the *Schneckloth* approach and discourage law enforcement officials from relying on consents, even though procurement of genuine consent is a technique less intrusive than others, including warrants, to which officials would be forced to turn were consents made more complicated to obtain and less reliable once obtained. We submit that respondent willingly consented to a search of his car, and that nothing in the record indicates in any way that he was coerced or was under duress of any kind, express or implied. Accordingly, the consent was effective, and the credit cards found in the search of his car were properly admitted into evidence against him.

[21] Our analysis is consistent with that used in the few other cases that have considered the validity of a consent by an individual under unconstitutional arrest. In *United States* v. *Bazinet*, 462 F. 2d 982, 987 (C.A. 8), the court held that an effective consent could be given, but that the court would subject the consent to strict scrutiny for evidence of coercion. To the same effect is *Phelper* v. *Decker*, 401 F. 2d 232, 237 (C.A. 5) (followed by *United States* v. *Horton*, *supra*, 488 F. 2d at 380, and *Bretti* v. *Wainwright*, 439 F. 2d 1042 (C.A. 5), certiorari denied, 404 U.S. 943). (But cf. *Manning* v. *Jarnigan*, 501 F. 2d 408 (C.A. 6)) *Phelper* held that a consent would be effective if the government could show by clear and convincing evidence that the consent was an act of free will sufficient to break the causal chain beginning with the unconstitutional arrest. To the extent *Phelper*, *Bazinet* and *Manning* support a more restrictive test than the one we have supported in the text, the difference is attributed to "fruit of the poisonous tree" problems. We have discussed these at note 20, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Either by statute or by judicial decision, every State, and the federal government, authorizes arrests for felonies to be made without a warrant if the arrest is supported by probable cause. Our research has not disclosed any state that requires officials to obtain a warrant simply because there is an opportunity to do so.

In addition to 18 U.S.C. 3061, which is discussed in the text, several other federal statutes authorize warrantless arrests: 18 U.S.C. 3052 (Federal Bureau of Investigation); 18 U.S.C. 3056 (Secret Service); 21 U.S.C. 878 (Bureau of Narcotics and Dangerous Drugs, and by substitution the Drug Enforcement Agency); 26 U.S.C. 7607 (Customs Service). Other federal agents also can make warrantless arrests; this Court has held that, when no federal statute authorizes warrantless arrests, officers are entitled to make such arrests if authorized by state law. *United States* v. *Di Re,* 332 U.S. 581, 588–590.

The American Law Institute's *Model Code of Pre-Arraignment Procedure* § 120.1 (Official Draft No. 1, 1972) provides that "[a] law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed (a) a felony * * *." The official commentary states: "The Code thus adopts the traditional and almost universal standard for arrest without a warrant" (*id.* at 129). The draftsmen considered imposing a requirement of a warrant if there was time to obtain one, but rejected that possibility because "the need for it is not urgent, and the subsequent inquiry such

a requirement would authorize would be indeterminate and difficult" (*id.* at 142; footnote omitted). See also the American Law Institute's *Code of Criminal Procedure* § 21 (Official Draft 1930).

Most states adhere to the same rule. We list below the states that follow the standard of the common law, as articulated by this Court in *Carroll* v. *United States,* 267 U.S. 132, 156–157.

Alabama—Alabama Code, Tit. 15, § 154 (1959).

Alaska—Alaska Statutes § 12.25.030 (1973) (same standard applies to both peace officers and private persons).

Arizona—Arizona Revised Statutes § 13–1403 (Supp. 1973).

Arkansas—Arkansas Statutes Annotated § 43–403 (1964).

California—West's Annotated California Penal Code § 836 (1970).

Connecticut—Connecticut General Statutes Annotated § 6–49 (1972).

Delaware—Delaware Code Annotated, Tit. 11, § 1904(b) (1975).

District of Columbia—D.C. Code § 23–581(a)(1)(A) (1973).

Florida—West's Florida Statutes Annotated § 901.15 (1973).

Hawaii—Hawaii Revised Statutes, Tit. 37 § 708–5 (1968) (felonies and misdemeanors treated alike).

Idaho—Idaho Code Annotated § 19–603 (1948).

Illinois—Illinois Annotated Statutes, ch. 38, § 107–2(c) (Smith-Hurd 1970) (felonies and misdemeanors treated alike).

Iowa—Iowa Code Annotated § 755.4 (1950).

Kansas—Kansas Statutes Annotated § 13–623 (1964).

Kentucky—Kentucky Revised Statutes Annotated § 431.005(1) (1969).

Louisiana—Louisiana Criminal Procedure Code Annotated, Art. 213 (West 1967).

Maryland—Maryland Annotated Code, Art. 27, § 594B (1971).

Michigan—Michigan Statutes Annotated § 28.874 (1972).

Minnesota—Minnesota Statutes Annotated § 629.34 (1947).

Mississippi—Mississippi Code Annotated § 99–3–7 (1973).

Nebraska—Nebraska Revised Statutes § 29–404.02 (Cum. Supp. 1969).

Nevada—Nevada Revised Statutes § 171.124 (1973).

New Hampshire—New Hampshire Revised Statutes Annotated § 594.10 (1974).

New Jersey—New Jersey Statutes Annotated §§ 40:174–103, 40:174–166, 40:174–196 (1967).

New York—New York Criminal Procedure Law § 140.10 (McKinney 1971).

North Dakota—North Dakota Century Code Annotated § 29–06–15 (1974).

Ohio—Ohio Revised Code Annotated § 2935.04 (Anderson 1954) (warrant must be obtained as soon as possible after arrest).

Oklahoma—Oklahoma Statutes Annotated, Tit. 22, § 196 (1969).

Oregon—Oregon Revised Statutes § 133.310 (1971–1972).

Rhode Island—Rhode Island General Laws Annotated § 12–7–4 (1970).

South Carolina—South Carolina Code Annotated § 17–251 (1962) (see also *Bushardt* v. *United*

Inv. Co., 121 S.C. 324, which explains that the power to arrest without warrant is not limited to instances enumerated in the statute).

South Dakota—South Dakota Com. Laws Annotated § 23–22–7 (1969).

Tennessee—Tennessee Code Annotated § 40–803 (1955).

Utah—Utah Code Annotated § 77–13–3 (Supp. 1973).

Vermont—Vermont Code of Criminal Procedure Rule 3(a) (1974).

Virginia—Virginia Code Annotated § 19.1–100 (Com. Supp. 1974) (see also *Crowder* v. *Commonwealth,* 213 Va. 151).

Washington—see *State* v. *Kohler,* 70 Wash. 599.

West Virginia—see *Hill* v. *Smith,* 107 Va. 848; *State* v. *Hammond,* 96 W. Va. 96; *State* v. *Brown,* 101 W. Va. 160.

Wisconsin—West's Wisconsin Statutes Annotated § 968.07 (1971).

Wyoming—Wyoming Statutes Annotated § 7–155 (1959) (arrest may be made without warrant, but detention cannot exceed time necessary to obtain post-arrest warrant).

Several states deviate from this model, but in all of them provisions are made for warrantless arrests.

Colorado—Colorado Revised Statutes § 16–3–102 (1974) provides that a warrant should be obtained "when practicable." This provision is apparently hortatory rather than directory, and arrests without warrant are upheld. See *Van Camp* v. *Gray,* 440 F. 2d 777 (C.A. 10). See generally Note, *The Evolution of the Police Officer's Right to Arrest Without a Warrant in Colorado,* 43 Denver L. J. 366 (1966).

Georgia—Georgia apparently permits arrests on warrants on less than probable cause (Georgia Code Annotated § 27–103 (1972)). Another statute (Georgia Code Annotated § 27–207 (1972)) also provides that an arrest may be made without warrant only if the offense is committed in the officer's presence, the offender is trying to escape, or "other cause" might produce a failure of justice if a warrant were sought. This section has been strictly construed as to misdemeanors. See *Thomas* v. *State,* 91 Ga. 204; *Yancey* v. *Fidelity & Casualty Co. of New York,* 96 Ga. App. 476. But see *Yates* v. *State,* 127 Ga. 813 (four month delay in making misdemeanor arrest without a warrant does not invalidate the arrest). We are not aware of any case, however, in which a felony arrest on probable cause has been declared improper under Section 27–207.

Indiana—Indiana Annotated Statutes § 9–1024 (1956) provides that if an arrest is made without a warrant, the suspect can be held only until a warrant is obtained. State case law has adopted the common law rule for warrantless arrests, however. See *Doering* v. *State,* 49 Ind. 56; *Hanger* v. *State,* 199 Ind. 727.

Maine—Maine Revised Statutes Annotated, Tit. 15, § 704 (1965) states that officers may arrest without a warrant, but must obtain one following the arrest. This procedure replaces Maine's common law rule that after a warrantless arrest the suspect was to be taken before a magistrate for a hearing on probable cause. See *Burke* v. *Bell,* 36 Me. 317.

Massachusetts—Massachusetts Annotated Laws, ch. 41, § 98 (1973) authorizes peace officers to make arrests but does not mention warrants. The Supreme Judicial Court has held that arrest with-

out a warrant is permissible if supported by probable cause. *Commonwealth* v. *Lawton,* 348 Mass. 129. Many Massachusetts statutes, however, grant express power to make warrantless arrests. See, *e.g.,* Ch. 166, § 42B (1974) (wire fraud); Ch. 266, § 102B (1974) (possession of Molotov cocktails); Ch. 271, § 10 (1968) (gambling).

Missouri—Under Missouri Annotated Statutes § 544.170 (1953), a suspect detained on warrantless arrest must be released unless a warrant is obtained within 20 hours. Cf. § 544.120. No statute creates a power to make warrantless arrests, but such power has been recognized judicially. See *State* v. *Padgett,* 316 Mo. 179; *State* v. *Hall,* 312 Mo. 425. Cf. Comments, *When Is an Arrest Warrant Required?,* 8 St. Louis L. J. 415 (1964); Scurlock, *Arrest Without Warrant,* 29 Kansas City L. Rev. 163 (1961).

Montana—Montana Revised Code Annotated § 95–608(d) (1969) authorizes arrest without a warrant if "the existing circumstances require * * * immediate arrest." As construed (*State* v. *Bennett,* 158 Mont. 496), this allows an arrest without a warrant even though there is time to obtain one. Under *Bennett,* Section 95–608 has been construed as coterminous with the Fourth Amendment, and the only requisite of an arrest is probable cause.

New Mexico—No statute specifically authorizes warrantless arrest. New Mexico Statutes Annotated § 41–1–5 (1973) requires prompt arraignment, and Section 41–1–6 (1973) recognizes, although it does not authorize, warrantless arrests for misdemeanors. New Mexico courts consistently have approved warrantless arrests. *Territory* v. *McGinnis,* 10 N.M. 269; *State* v. *Barreras,* 64 N.M. 300; *State* v. *Selgado,* 76 N.M. 187.

North Carolina—North Carolina General Statutes § 15–41 (1965) states that warrantless arrest is authorized when an officer has "reasonable ground" to believe a felony is being committed in his presence, or reasonable ground to believe the suspect will evade arrest if not immediately taken into custody. By judicial construction, a peace officer is entitled to arrest without warrant pending an "inquiry" into probable cause. *Neal* v. *Joyner,* 89 N.C. 287. See generally Coates, *The Law of Arrest in North Carolina,* 15 N.C. L. Rev. 101 (1936).

Pennsylvania—Pennsylvania Statutes Annotated, Tit. 19, § 12.7 (Supp. 1974) preserves the common law powers of arrest. At common law in Pennsylvania, warrantless arrests were proper. *Commonwealth* v. *Bosurgi,* 411 Pa. 56, certiorari denied, 375 U.S. 910; *Commonwealth* v. *Smith,* 225 Pa. Super. 509.

Texas—A warrant is preferred as the method of arrest. *Honeycutt* v. *State,* 499 S.W. 2d 662 (Ct. of Crim. App.). However, extensive exceptions are created by Texas Code of Criminal Procedure Arts. 14.01 and 14.04 (1974), and in most cases probable cause will support an arrest. *Ciulla* v. *State,* 434 S.W. 2d 948 (Ct. of Civ. App.); *Caffey* v. *State,* 433 S.W. 2d 900 (Ct. of Crim. App.). See generally Potts, *The Law of Arrest,* 1 Baylor L. Rev. 397 (1949).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-538

UNITED STATES OF AMERICA,

Petitioner,

v.

HENRY OGLE WATSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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UNITED STATES OF AMERICA,

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Watson*, 504 F.2d 849 (1974).

QUESTIONS PRESENTED

1. Whether an arrest is invalid when conducted without exigent circumstances, and without warrant, six days after probable cause to arrest is obtained.

2. Whether a consent to search is invalid when obtained during the term of an unlawful custody and as a result of an illegal arrest.

STATEMENT

The following factual material is submitted as a supplement to the statement contained in the Brief for Petitioner.

The United States postal inspector, FRANK BARBARICK, had contact with the informant AWAD KHOURY, four or five times in 1972 regarding alleged mail fraud cases concerning Mr. WATSON. Appendix page 26. Khoury never testified in Court with regard to any of the information he gave to the inspector, nor had the information led to any arrests prior to the arrest of respondent on August 23, 1972, nor to any convictions. No corroboration was obtained with regard to KHOURY's information regarding WATSON, and no arrest of the respondent was made as a result of these early meetings. On August 17, 1972, KHOURY told BARBARICK that he (KHOURY) was about to obtain a credit card from HENRY WATSON later that day. Appendix, page 11-12. BARBARICK obtained the credit card and KHOURY indicated he could obtain more cards from respondent. At the agent's insistence, KHOURY arranged a meeting, which was postponed several times, but which eventually transpired on August 23, 1972. BARBARICK had arranged with KHOURY for a signal to indicate if WATSON was in possession of any stolen mail. The signal was given. BARBARICK then entered the restaurant in which KHOURY and respondent were meeting, and placed respondent under arrest.

WATSON was placed under arrest for the card obtained by BARBARICK on August 17, 1972, and not based upon the signal received by the surveilling agent on August 23, 1972. Appendix, page 23-24.

Respondent was then removed from the restaurant and given his *Miranda* warnings. BARBARICK asked if he could search respondent's car, to which respondent allegedly answered, "go ahead." BARBARICK conducted a search of the automobile and discovered an envelope on the driver's side under the floormat. The envelope was not opened until BARBARICK returned to his office in downtown Los Angeles. Appendix, page 90. Two envelopes were contained inside the outside envelope, and it was these two envelopes which contained the credit cards which were the source of the allegations in Counts 1 and 3.

A. AN ARREST IS INVALID IN THE ABSENCE OF A WARRANT OR EXIGENT CIRCUMSTANCES.

ARGUMENT

I.

THE PRIVACY OF THE PERSON IS TO BE ACCORDED AT LEAST AS SACROSANCT A POSITION AS THE PRIVACY OF ONE'S EFFECTS OR DWELLING.

The Fourth Amendment to the United States Constitution provides specific protection for the privacy of the "person" as well as "houses, papers and effects." Rationally, unless the notions of privacy ensconced in

that Amendment are to become enmeshed in a procedural morass, the protection of the person should be accorded the greatest protection. The notion that the places and things protected under the Fourth Amendment receive that protection only as a logical extension of protection to the person was underscored in *Katz v. United States*, 389 U.S. 347 (1967). The enormous body of litigation which has arisen under the search and seizure provisions of the Fourth Amendment on occasion results in a loss of perspective with regard to the basic protection of that provision. This Court has, from time to time, found it necessary to remind law enforcement, the legal profession and scholars alike that the ultimate privacy to be protected is the person and that the constitutional guidelines established under the Amendment apply with equal, if not greater, force there. *Katz v. United States, supra; Giordenello v. United States*, 357 U.S. 480 (1958).

As a result, while the accident of the course of litigation has resulted in an analysis of the Fourth Amendment protections primarily in a search and seizure situation, the application of these principles to the seizure of the person is by no means foreign or novel to Fourth Amenement analysis but, in fact, plays perhaps the most essential part in the application of the salutory provisions.

II.

THE APPLICATION OF THE FOURTH AMENDMENT WARRANT REQUIREMENTS TO AN ARREST IS HISTORICALLY, RATIONALLY AND PRACTICALLY MANDATED.

The balance of reasonableness which is to be struck in the Fourth Amendment analysis has been described as an "accommodation between the individual's right to liberty and the state's duty to control crime." *Gerstein v. Pugh*, ____ U.S. ____, 95 S.Ct. 854, 862 (1975). This in turn evolved to an analysis of the legitimate interests and pressures of law enforcement vs. the privacy interest which an individual may legitimately claim in the particular area sought to be intruded upon. Recognition of the sanctity of the home has led to a strict application of the warrant requirement in that area. The existence of a perhaps lesser interest in the privacy of a vehicle, when compared with the *possible* greater difficulties posed to law enforcement, results in a different balance being struck there. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 137 (1925). However, even in the latter circumstance, the availability of search upon probable cause alone is limited by the factual situation presented to the seizing authority. Thus, in *Roaden v. Kentucky*, 93 S.Ct. 2796 (1973), the Court required the demonstration prior to a search of an automobile upon probable cause of "exigent circumstances in which police action literally must be 'now or never.'" Similarly, the relative ease of obtaining a warrant and the lack of necessity for swift action without prior approval of a detached magistrate will also alter the

availability of search upon probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The applicability of these principles to an arrest clearly appears from this Court's recent pronouncements in *Gerstein v. Pugh, supra*. This Court has recognized there that the Fourth Amendment requires that the existence of probable cause "be decided by a neutral and detached magistrate whenever possible." Ibid. This Court in *Gerstein v. Pugh*, while recognizing that a preference for the use of an arrest warrant exists, *Beck v. Ohio*, 379 U.S. 89 (1964), expressed concern that an intolerable handicap for legitimate law enforcement would result through requiring a factual justification prior to "*any* arrest." Ibid. But see *Gerstein v. Pugh*, ____U. S. _____, 95 S.Ct. at 862, footnote 12. Inasmuch as the individual's interest in his personal privacy is at least as great as his interest in the privacy of his dwelling or effects, the ability to arrest upon probable cause without prior approval of the magistrate must arise from the necessity to protect the legitimate interests of law enforcement. A per se rule that a warrant is required in no arrest situation is as inappropriate as a per se rule with regard to searches. Thus, the facts of each case must control the necessity for prior judicial evaluation. As was stated in *Coolidge v. New Hampshire, supra*:

> "The case of *Warden v. Hayden*... where the court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stand by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." 403 U.S. 479-481.

When measured against these standards, it becomes apparent that the facts of the instant case are

insufficient to justify the actions of the federal authorities without prior judicial approval.

The unique facts of this case give rise to the absence of exigency or other legitimate law enforcement concern for prompt action. The postal inspector who effectuated the arrest testified without equivocation that the respondent was arrested based solely upon the credit card which had been provided six days prior. The testimony of the inspector further indicated that every opportunity existed to obtain such a warrant. Appendix page 29ff. The facts clearly indicate that the arresting agents had probable cause to arrest the respondent for the offense on which he was ultimately arrested six days prior to the arrest, but at no time attempted to obtain prior judicial approval for that arrest. No accommodation to legitimate law enforcement functions would be served through permitting such a delay. On the contrary, the position adopted by the Ninth Circuit will inure to the benefit of law enforcement. As indicated in the brief of petitioner, page 26, footnote 15, the propriety of an arrest will be more favorably assessed if the officer's belief regarding probable cause has been approved by a detached judicial officer. *United States v. Ventresca*, 380 U.S. 102, 106. Similarly, officers will be able to refrain from making improper arrests, once having been informed by a magistrate that the evidence in their possession is insufficient to substantiate probable cause. Petitioner's assertion in that same footnote that the interposition of a magistrate will protect a suspect only in "close cases" misses the point. For, an officer's determination as to the "closeness" or "obviousness" of probable cause lies at the heart of the requirement of the imposition of a detached judicial official.

Moreover, the use of a warrant in the present case would insure that the arrest was made while evidence was fresh and, to the extent that the officers feel the suspect will be involved in future criminality, prevents the commission of such crimes by effectuating an arrest of that suspect. The inconvenience to the officers, on the other hand, is minimal. No facts were produced to demonstrate that a warrant could not have easily been obtained during the six day period.

Petitioner has expounded a series of policies to support its conclusions with regard to the propriety of the Circuit Court's ruling. Brief for Petitioner, pages 22-26. In general, each of these policy considerations relies upon two assumptions made by petitioner which are incorrect. The first arises from petitioner's statement of the issue as whether a warrant for arrest is necessary for an arrest in a public place. The proper issue, however, is whether a warrant is required *prior to an arrest* when there exists no exigent circumstances for a warrantless arrest and there exists abundant time to obtain a warrant. The second of petitioner's misconceptions is that it interprets the opinion below as requiring the officers to obtain a warrant as soon as probable cause arises. That opinion, however, merely requires that police officers, in a situation not involving exigent circumstances, obtain an arrest warrant prior to the arrest of the suspect. In the instant case, therefore, if the officers were to base their arrest upon the card obtained on August 17, 1972, there being no exigent circumstances, a warrant was necessary.

Petitioner's first consideration in his brief at page 22, is that "a requirement that a warrant for arrest be obtained as soon as public officials have accumulated probable cause to arrest would put an unnecessary and

unfortunate premium upon haste . . . " Petitioner goes on to argue that even after probable cause to arrest arises, officers may attempt to obtain additional evidence. This argument fails in several respects. First, as indicated above, the question is not whether a warrant must be obtained "as soon as public officials have accumulated probable cause" but whether the warrant must be obtained prior to arrest.[1] Second, petitioner's argument assumes that the investigation must terminate upon the arrest of the suspect. This is clearly not the case. Third, and with special regard to the facts of the present case, the agents here did not conduct an investigation with regard to the August 17 credit card, but were attempting to incriminate the respondent with regard to new offenses.

Petitioner goes on to argue at page 23 of his brief that circumstances may exist in which officers, although armed with probable cause, may be investigating the wrong suspect and that a continued period of investigation might establish this person's innocence. Again, the decision of the Court of Appeal does not require an immediate arrest. Secondly, the balance with regard to innocence or guilt may be struck differently

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[1] The incorrectness of the petitioner's position is adequately underscored by the Circuit Court's reliance upon *Coolidge v. New Hampshire, supra*. The issue in that case was not whether the search was illegal as a result of delay in searching, but rather whether the search, in the absence of a warrant and exigent circumstances was illegal. The fact of delay is only relevant with regard to a determination as to whether exigency existed. In both *Coolidge* and the present case, respondent does not complain because the officers waited to arrest him, but, rather, that they had every opportunity to obtain a warrant during that term of delay and thus submit the issue of probable cause to a magistrate.

by an officer involved in the "competitive enterprise of ferreting out crime" than by a magistrate. As indicated previously, this Court has required the issue of probable cause to be submitted to a magistrate where practicable. The argument is also inapplicable to the present case, based upon the clear indication of the agent that the arrest was for the initial offense, and that there could therefore be no attempt to clear the respondent of this crime.

Petitioner next argues that a rule requiring a warrant "as soon as he has obtained probable cause" would expose officials to the horns of a dilemma. Petitioner argues that if the officers fail to realize probable cause exists, and rely upon other indicia of guilt, they risk suppression of their later discoveries. This is clearly incorrect. If the officers in the present case waited for other indicia of guilt, and if they had arrested upon such indicia of guilt, that arrest, if based upon exigent circumstances, would have been valid. In such a situation, the failure to arrest upon the initial offense would not have vitiated either the arrest or the later discoveries. Again, the issue is not the officers delayed in making the arrest, but rather that the absence of exigent circumstances and the opportunity to obtain a warrant required that it be obtained.

Petitioner asserts in footnote 13 at page 24 of his brief that KHOURY's signal itself furnished probable cause to arrest the respondent or strongly reinforced the preexisting cause. The agents testified, however, that they arrested the respondent only upon the August 17 credit card. They did not rely upon KHOURY's signal. There was no claim that exigency arose as a result of that signal. In short, the government failed to sustain its burden of proof with regard to the arrest with regard to exigency.

Petitioner next asserts at pages 24-25 of the brief for petitioner that the longer the officers postponed the arrest, the less useful a warrant would become as a shield against unjustified behavior. During this period of delay, petitioner argues, officers will have an opportunity for "reflection" and may supplant the initial grounds by other and "more persuasive grounds." Once again, the agents in the instant case were perfectly free to continue their investigation. If they had discovered evidence of another crime, they could have arrested upon that evidence. However, once they determined to make an arrest for the initial offense, in view of the ability to obtain a warrant, they were required to do so. The dilemma proposed by petitioner at footnote 14, page 25, brief for petitioner, is similarly dispelled. Petitioner there asserts that the officers would be "best off should the magistrate decline to issue a warrant when first approached." In petitioner's view, this would allow the officers to continue their investigation. The officers could then "arrange" to gather additional evidence and arrest on the spot "on the basis of this new evidence plus exigent circumstances." The dilemma, does not arise, simply because there is no requirement that the officers obtain the warrant immediately. Similarly, the officers, if they had demonstrated exigent circumstances, could have arrested respondent based upon probable cause plus exigent circumstances. However, they chose not to do so, but rather to rely upon the August 17 offense. Once again, the burden was upon the government to justify the

warrantless arrest and their failure to establish or rely upon exigency bars that consideration here.[2]

Petitioner's final argument is that a policeman's "on the scene" assessment of probable cause is sufficient, especially in view of this Court's determination in *Gerstein v. Pugh*, No. 73-477, decided February 18, 1975, that a probable cause determination is necessary promptly after arrest in order to justify continued detention. While this position has great vitality in a situation in which exigent circumstances exist, the warrant requirement of the Fourth Amendment as consistently interpreted by this Court requires that that determination be made by a magistrate where practicable. This Court determined in *Gerstein v. Pugh*, that even a slight detention raises serious issues of due process. Where there is adequate opportunity to obtain a warrant, the proper procedure is and should be to submit that determination to a magistrate prior to the arrest. Petitioner's previous concern at page 23 of the brief for petitioner for the possible arrest of innocent suspects is completely inconsistent with the position at pages 25-26 of the brief in failing to recognize the severe hardship and constitutional deprivation which is inherent in any detention or arrest.

In sum, the basic constitutional rationale expressed on numerous occasions by this Court with regard to the necessity for a detached magistrate's determination of probable cause, where practicable, applies most strongly in an arrest situation. There is no doubt that the agents

[2] As a result of the agent's failure to rely upon the events of August 23 with regard to the arrest of the respondent, this area was not explored below by respondent's counsel. Thus, very sound legal, practical and constitutional reasons may have existed for such non-reliance.

in the present case arrested as a result of the six day old offense. The government in this case would be hard put to claim a harmful effect upon law enforcement through the utilization of the warrant procedure inasmuch as the inspectors themselves apparently felt that the six day lapse would have no harmful effects upon their case or society. The benefit to the individual is apparent and was recognized through the adoption of the Fourth Amendment to the United States Constitution.

III.

AN ALTERNATIVE BASIS EXISTS FOR SUSTAINING THE DECISION OF THE COURT BELOW.

Aside from the issues raised in the petition for writ of certiorari, it appears that the information relied upon by the postal inspector in order to arrest the respondent was constitutionally inadequate. Under the standards announced in *Aguilar v. Texas*, 378 U.S. 108 and *Spinelli v. United States*, 393 U.S. 410, a determination of sufficiency of information to support probable cause which relies upon information, must present sufficient facts to establish the reliability or credibility of that informant. The present situation is somewhat unique in that the only information relative to criminal conduct comes through the mouth of the informant. Thus, it is absolutely essential, in order to substantiate the arrest and subsequent search involved, that this informant meet the *Aguilar-Spinelli* standards.

Inspector BARBARICK testified that he spoke with KHOURY in 1972 and that on each of these occasions

the conversations involved Mr. WATSON. KHOURY admittedly had been arrested for mail violations himself. At the time of his arrest, which was the first meeting with BARBARICK, KHOURY stated that he had obtained the necessary documents to allow him to engage in mail fraud for Mr. WATSON. However, no corroboration was done by BARBARICK with regard to this aspect of KHOURY's information, and no arrest of the respondent was made for that crime. Appendix pages 30-31. The other information which BARBARICK received from KHOURY dealt with associates of the respondent. However, KHOURY was never surveilled by the agents to ascertain if he actually did come in contact with these "associates." No arrests were made based upon this information, and KHOURY never testified with regard to any of this information. No arrests or convictions had arisen out of any of KHOURY's information. The only corroboration which was indulged in by the agents was apparently to ascertain that, to their knowledge, the people mentioned by KHOURY were in fact somehow associated with WATSON. No corroboration was made with regard to any facts which were at all criminal in nature. Corroboration with regard to criminality, however, is absolutely essential under the dictates of *Spinelli v. United States, supra*. It is difficult to imagine, therefore, that the information given at the suppression hearing could establish the reliability of Mr. KHOURY or his present credibility.

Furthermore, there was no corroboration made with regard to the information given by KHOURY concerning the present incident with the respondent. BARBARICK took at face value all of the allegations made by KHOURY, including that respondent had

given KHOURY the list of airports and the credit card upon which the arrest was based. In contrast, although a series of meetings were allegedly arranged between KHOURY and respondent, two or three of them did not actually take place. BARBARICK never overheard any conversations between KHOURY and respondent. It is inconceivable that these facts can meet the bare minimum standards of the test enunciated by *Aguilar v. Texas, supra,* and *Spinelli v. United States, supra.*[3] The arrest of the respondent was therefore constitutionally impermissible.

B. THE CONSENT TO SEARCH OBTAINED DURING THE COURSE OF ILLEGAL CUSTODY MAY NOT BE RELIED UPON TO SUPPORT THE LATER SEARCH OF THE AUTOMOBILE.

1. The principles of *Schneckloth v. Bustamante,*[4] are inapplicable to the present case.

Petitioner has placed great reliance upon this Court's opinion in *Schneckloth v. Bustamante, supra*. Brief for

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[3]It should be noted that an alternative ground, authorizing suppression of the evidence presented to the Court of Appeals, but not discussed in the opinion, is that the seizure of the envelope with its unknown contents was itself impermissible and could not be justified under any recognized constitutional doctrine. The validity of a "plain view seizure" requires that it be "immediately apparent to the police, that they have evidence before them." *Coolidge v. New Hampshire, supra*. The later search of the envelope also violates the precepts of *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881 (1964).

[4]412 U.S. 218 (1973).

Petitioner, pages 27-39. Two crucial distinctions, however, exist between the instant case and the factual situation considered in *Schneckloth*. The first is that the respondent here was in custody at the time of the elicitation of the purported consent. The second factor is that the custody situation was itself illegal and in violation of the Constitution. (See preceding argument.) Each of these considerations is important to an analysis of the legitimacy of the consent and is determinative of the issue.

This Court in *Schneckloth* was careful to limit the scope of its holding. The opinion concluded at 412 U.S. 249-250 with the *caveat*:

> "Our decision today is a narrow one. We hold only that when the subject of a search is *not in custody* and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (Emphasis added)

The importance of the custodial nature of the interrogation was clearly recognized by this Court. Thus, custodial interrogation was termed "inherently coercive." 412 U.S. at 240. See also 412 U.S. at 232. The importance of this difference was outlined at 412 U.S. 228:

> "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

Thus, contrary to the petitioner's contention, the Court's opinion in *Schneckloth* in fact recognized the coercive nature of custodial interrogation and, it is submitted, that this distinction alone would give rise to a difference in result. Furthermore, it is apparent that the Fifth Amendment guarantee against self-incrimination is especially critical in a custody situation. To a lay suspect, however, silence, in the face of a request for consent, may be considered tantamount to an admission. Recognition of this natural tendency to assume guilt based upon silence or assertion of constitutional right was made in *Griffin v. California,* _____ and the discussion there is equally applicable to the present situation. Consequently, exclusion of consent obtained through custodial request is constitutionally compelled. Furthermore, unlike *Schneckloth v. Bustamante, supra*, this Court is in the present case free to exercise its supervisory powers over the activities of the federal judiciary and authorities involved.

The second very crucial difference between the present case and *Schneckloth* is in the illegal nature of the custody. Petitioner's contention, as stated at pages 37ff of the brief for petitioner, is that lack of knowledge on the part of the suspect of the illegality of the arrest vitiates any proper consideration of that illegality with regard to the later consent. However, it is apparent that this Court has been very careful to avoid utilization of illegal police procedure to obtain evidence or testimony against a criminal defendant. The Court has explicitly recognized coercion to be implicit in any submission to a *claim* of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543 (1968). In the present case, the exploitation of the illegal arrest is tantamount

to the assertion of lawful authority found coercive in *Bumper*. In each case, the assertion of the right to initiate the questioning was based upon a non-existent authority. This Court has emphasized that the actions of police officers are to be judged in a common sense and non-technical manner. *United States v. Ventresca, supra*. No less a standard should be applied to the actions of a recently arrested suspect. It would be unreasonable and hyper-technical to expect a criminal defendant to stand mute in the face of an official and apparently legal request to conduct a search. In such a situation, the consent is inextricably bound to the prior illegal activity. Interestingly, the Court's opinion in *Schneckloth v. Bustamante, supra*, followed almost precisely the holding of the California Supreme Court on direct appeal. The California courts had long held that the voluntariness of the consent was to be judged upon the totality of the circumstances. The California courts, however, have also held that consent obtained during the course of an illegal detention or search is too closely associated with that illegal activity to be valid. *Burrows v. Superior Court*, 13 Cal.3d 238 (1974); *People v. Lawler*, 9 Cal.3d 156 (1973); *People v. Superior Court*, 71 Cal.2d 265 (1969); *People v. Haven*, 59 Cal.2d 713 (1963). The Ninth Circuit has also previously come to a similar conclusion in *United States v. Rothman*, 492 F.2d 1260, 1265 (1973), where it was noted:

> "This is not a case in which a consent search was necessary or proper. If probable cause for a search was available the officers had ample time to get a warrant. (Citation omitted.) There was no risk that evidence would be lost or destroyed or that Rothman would flee. In short, there was no justification for the coercive official tactics which produced this consent."

Similarly, in *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974), the Court considered an automobile stop conducted without probable cause. During the term of the detention, consent to search was obtained and the Court determined that the items seized pursuant to the consent, as the fruit of the unlawful detention, should have been suppressed. See also *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); and *United States v. Kandlis*, 432 F.2d 132 (9th Cir. 1970).

The necessity for such a prophylactic action results not only from a need to prevent judicial involvement in illegal police activity, but to discourage such activity in the first instance. Petitioner in its brief, has underscored the wide use of consent throughout federal and state jurisdictions. This Court has also recognized the widespread use of this search tactic. *Schneckloth v. Bustamante, supra*. Thus, it is highly probable that officers may be encouraged to conduct an illegal arrest in the hopes of obtaining a valid consent to search thereafter. In such a way, investigative agencies, realizing the subtle coercive effects of custodial requests to search, may initiate such arrests upon suspicion or whim, realizing that the worst that can happen is that the suspect would refuse to consent. On the other hand, if the suspect falls prey to the pressures of custody and does "consent" contraband or evidence, although completely unknown to the officers prior to the search, could be uncovered. Persons innocently going about their business could therefore be subject to detention or arrest without any sufficient basis solely upon the suspicion or belief of police authorities.

In this case, it is clear that the agents, armed with probable cause to arrest the respondent, waited over a

period of several days until they felt the respondent might be in a position in which they could, through one means or another, initiate a search of the respondent's person and automobile in order to discover additional items of evidence or contraband. The possibility for abuse is highlighted not only by the fact that the agents arrested the respondent based *only* upon the information which they had possessed for six days and not upon the information they obtained on the day of arrest; but that the agent did not even bother to verify his opinion of the nature of the contents of the discovered envelope until returning to his office hours later. It thus appears that the factual circumstances of this case directly parallel the concern which this Court expressed in *Chimel v. California*, 395 U.S. 752 (1969). The pre-*Chimel* search incident to arrest rule, enshrined in *United States v. Rabinowitz*, 339 U.S. 56 (1950), presumably permitted officers, armed with probable cause, to arrest a suspect and utilize that arrest as a subterfuge to authorize a wholesale search of the suspect's dwelling. The prophylactic measures announced in *Chimel* are equally applicable to the arrest situation and the determination that the "consent" in the present case is illegal is consistent with these principles.

2. The Consent obtained from respondent was illegal even under the principles of *Schneckloth v. Bustamante, supra.*

As indicated previously, petitioner relies almost exclusively upon this Court's decision in *Schneckloth v. Bustamante, supra*, with regard to the issue of the

voluntariness of the consent. The tenor of the petitioner's argument is that the only considerations relevant to the voluntariness determination under *Schneckloth* are those relating to the subjective impressions of the respondent. A fair reading of *Schneckloth*, however, supports no such limitation. This Court has stated that the proper focus is on the "totality of the circumstances." Such "totality" would appear to include more than the limited inquiry into the subjective state of the respondent. *Schneckloth* cites as support for its conclusion *Davis v. United States*, 328 U.S. 582 (1946). Two of the factors relied upon there with regard to the voluntariness determination were "the public character of the property" and the "existence of the right to inspect." These inquiries have no relevance with regard to the subjective state of the alleged consentor, but, rather, bear upon the legality and appropriateness of the police conduct. This Court in *Schneckloth* went on to note:

> "Two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." 412 U.S. at 227.

The language chosen by the Court with regard to "legitimate need" reflects the analysis made by this Court in the preceding paragraph of the *Schneckloth* opinion in which it was stressed that the standards announced were a balance between a protection of the security of the citizenry and the necessity for effective and proper law enforcement. Thus, the *Schneckloth* determination would seem to include in each case an analysis of whether the consent as obtained served this

legitimate police function. It thus becomes apparent that considerations as to the legality of the arrest and detention of respondent are competely relevant in determining the "voluntariness" of the consent. For, exploitation of illegal procedure does not serve the legitimate ends of effective law enforcement. The interpretation sought by petitioner would have the deleterious effect of encouraging to some degree an illegal detention or arrest in the hopes of obtaining a consent. However, there should be no right for an investigative agency to benefit from a situation which it had no right to create in the first instance.

This case thus presents a situation in which consent was obtained during an illegal arrest and without advisement of the right to refuse such authority. These factors, together with the ability of this Court to exercise its supervisory powers over the federal judiciary and law enforcement agencies mandates that the consent from the respondent be determined to be invalid.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I

THE ARREST

A. Respondent contends (Br. 13-15) that his arrest was not supported by probable cause. Respondent made an identical argument to the court of appeals, which properly rejected it (Pet. App. 4A-5A).

We submit that the contention that Inspector Barbarick lacked probable cause to arrest respondent is insubstantial. Respondent asserts (Br. 13) that

probable cause is absent because "the only information relative to criminal conduct comes through the mouth of the informant," who, respondent maintains, was not reliable. But Awad Khoury, Inspector Barbarick's informant, not only told Inspector Barbarick that respondent was in possession of credit cards stolen from the mails, but also obtained one of the cards and gave it to Barbarick (A. 13). Barbarick ascertained from the Bank of America that the card had been mailed but not received by the intended customer (*ibid*). Khoury had provided reliable information in the past (A. 51-53). Khoury's story admitted his own involvement in the use of the stolen credit cards and was thus against Khoury's penal interest. Finally, respondent was personally known to Barbarick as one who had previously engaged in mail theft; respondent had been apprehended for such an offense, although he was not prosecuted when he provided information that led to other convictions (A. 33, 45, 84-85).

It is thus beyond serious dispute that respondent's arrest was not based "solely on the hearsay report of an unidentified informant" (*United States* v. *Harris*, 403 U.S. 573, 576) or on a "casual rumor" (*Spinelli* v. *United States*, 393 U.S. 410, 416). Indeed, the information and credit card provided by Khoury to Barbarick on August 17, 1972, not only established probable cause, but were sufficient to send to the jury that charge of possession of material stolen from the mails (and thus sufficient in law to

support a conviction). *A fortiori*, they established probable cause for respondent's arrest.[1]

If the Court should accept respondent's argument that the information in the hands of Inspector Barbarick on August 17 did not establish probable cause to arrest respondent, then Barbarick could not, of course, have obtained a warrant. Under the analysis of the court of appeals, he therefore would have been at liberty to arrest respondent without a warrant on August 23, when Khoury gave the signal informing Barbarick that respondent was in possession of additional stolen credit cards (A. 17-18). This information would have established that respondent was committing an additional crime, and Barbarick would have been entitled to arrest him on the spot. *United States* v. *Weaklem*, 517 F.2d 70, 72 (C.A. 9) (distinguishing the instant case as resting solely upon the long delay between the acquisition of probable cause and respondent's arrest). See our brief at 19-20, n. 10.

B. Two cases decided after we filed our opening brief have held that warrantless arrests are proper whenever the arresting officers have probable cause to believe that a felony has been committed. Both cases reject the holding below that a warrant must be obtained during an interlude between acquisition of

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[1] This transaction was made the basis of a separate count of the indictment, on which the jury acquitted respondent. Although that acquittal suggests the dangers of making premature arrests before gathering corroborating evidence, it does not demonstrate that the evidence gathered on August 17 was insufficient to establish probable cause.

probable cause and the arrest. See *United States* v. *Cantu*, C.A. 7, No. 74-2037, decided July 22, 1975 (two day interlude); *Bishop* v. *Wainwright*, 511 F. 2d 664, 667 (C.A. 5) (five day interlude).

II

THE CONSENT SEARCH

A. Our analysis of the consent issue is not affected by this Court's intervening decision in *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975. The inquiry required by *Schneckloth* v. *Bustamonte*, 412 U.S. 218, is a Fourth Amendment inquiry; an effective consent to search is dispositive of the Fourth Amendment interests of the consenter. We have argued that the *Schneckloth* standards are satisfactory to safeguard a consenter's legitimate Fourth Amendment interests. Thus the "fruit of the poisonous tree" analysis carried out in *Brown* adds little of value to the *Schneckloth* inquiry; *Brown* neither mentioned nor affects *Schneckloth*. See our opening brief at 35-38, nn. 20, 21.

Even to the extent a "fruits" analysis is important in determining the voluntariness of a consent, however, there are important differences between *Brown* and the instant case. There was no probable cause to arrest in *Brown*; it was a violation of the Fourth Amendment to arrest Brown at all, and that violation was exploited by the officers to yield incriminating evidence. By contrast, because there was probable cause to arrest respondent, the constitutional choice

is between arrest with a warrant and arrest without a warrant. The postal inspectors did not (indeed, could not) "exploit" the lack of a warrant to increase the probability that respondent would consent.[2] In *Brown* the violation was a *sine qua non* of Brown's confession; here, the violation of the Fourth Amendment (if arrest without a warrant is a violation) did not produce or cause respondent's consent. Moreover, in *Brown* the officers knew or should have known that their actions were unconstitutional; in the instant case the inspectors could not have anticipated that a court would fault their performance. We submit that *Brown* does not afford support to respondent.

B. Respondent relies upon cases such as *Bumper* v. *North Carolina*, 391 U.S. 543, in which the Court has held that a consent is ineffective if it is no more than submission to a claim of lawful authority to conduct the search. Contrary to respondent's assertion, respondent's arrest is not "tantamount to the assertion of lawful authority found coercive in *Bumper*" (Br. 17-18). The arresting inspectors did not inform respondent that they had the lawful authority to search his car, or that he was under some obligation to consent to a search. Quite the contrary, respondent knew that he need not give his consent (see our opening brief at 31-32 and n. 17). If respondent's arrest was illegal, that illegality did not

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[2] We have argued (see opening brief at 35) that in some circumstances an arrest may make consent less likely. The same cannot be said of confessions.

affect his consent because he was not aware either of the lack of a warrant or that a warrant might be required. Unlike the case in *Bumper*, where the claim of right to make a search was communicated to the person who gave consent and was highly salient to the consent decision, the illegality of respondent's arrest was unknown to him. There is not the slightest indication in the record that respondent either knew or cared that the inspectors did not possess a warrant for his arrest. The officers asserted no claim of right; they practiced no intentional deception; the lack of a warrant had no effect upon respondent's decision to consent.[3]

For the foregoing reasons, and for the reasons set out in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[3] Two cases that have come to our attention after we filed our opening brief should be added to the cases at Br. 33, n. 18; all hold that the standards of *Schneckloth* govern consent given while in custody. See *United States* v. *Gavic*, C.A. 8, No. 74-1715, decided July 11, 1975, slip op. 9-10 (collecting cases); *Hayes* v. *Cady*, 500 F.2d 1212, 1214 (C.A. 7).

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